

Supreme Court, U. S.
F I L E D

JAN 17 1975

No. 74-884

MICHAEL RUBAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPHINE M. POWELL

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

ROBERT H. BORK,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,

JEROME M. FEIT,
RICHARD S. STOLKER,
Attorneys, /
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPHINE M. POWELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 501 F.2d 1136.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on August 7, 1974. The court of appeals permitted the government to file an untimely petition for rehearing and suggestion for rehearing

en banc (App. C, *infra*), and it was denied on November 21, 1974 (App. D, *infra*). By order of December 13, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a statute prohibiting the mailing of firearms "capable of being concealed on the person" is unconstitutionally vague on its face.

STATUTE AND REGULATION INVOLVED

18 U.S.C. 1715 provides in relevant part:

Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable and shall not be deposited in or carried by the mails or delivered by any officer or employee of the Postal Service. Such articles may be conveyed in the mails, under such regulations as the Postal Service shall prescribe, [to enumerated recipients]. * * *

39 C.F.R. 124.5 provides in relevant part:

(a) *Nonmailable firearms.* (1) Pistols, revolvers, and other similar firearms capable of being concealed on the person, addressed to persons other than those indicated in § 124.5(b), are nonmailable.

* * * * *

(4) The phrase "all other firearms capable of being concealed on the person" includes, but is not limited to, short-barreled shotguns, and short-barreled rifles.

(5) The term "short-barreled shotguns" means a shotgun having one or more barrels less than 18 inches in length and any weapon made from a shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches. A short-barreled shotgun of greater dimensions may also be regarded as nonmailable when they [sic] have characteristics allowing them to be concealed on the person.

* * * * *

STATEMENT

On February 28, 1973, Mrs. Theresa Bailey received in the mail a package addressed to her residence in Tacoma, Washington, and mailed from Spokane, Washington (Tr. 7-10, 14). This package contained two shotguns, shotgun shells and hacksaw blades (Tr. 14). Mrs. Bailey, not knowing who had sent the package, contacted her husband, an inmate in McNeil Island Federal Penitentiary (Tr. 6, 7).¹ He assured her that he had not sent, and had no knowledge of, the package (Tr. 20).

The contents of the package were turned over to an agent of the Federal Bureau of Investigation and an official of the penitentiary (Tr. 21-22). An investigation disclosed that one of the shotguns had been purchased by respondent in Spokane on February 21, 1973 (Tr. 266-267), and that the other had been purchased on the same date by a woman meet-

¹ Respondent's common law husband, Travis Powell, also was incarcerated in McNeil Island (Tr. 460, 466).

ing the general description of respondent (Tr. 277-282).

On March 9, 1973, Mrs. Bailey received a telephone call from an unknown woman, advising her that "a second package was coming, and it was a mistake" (Tr. 24). The caller requested Mrs. Bailey to give the second package to "Sally", but Mrs. Bailey responded that she "did not have an address or any way of giving it to Sally" (*ibid.*). An investigation determined that this telephone call had been placed from respondent's residence in Spokane (Tr. 263, 328, 501).

Mrs. Bailey received the second package in the mail on March 13 (Tr. 25-26). She gave the package to the investigating agents without opening it (Tr. 58, 110); the return address was that of respondent (Tr. 28, 229, 262, 501).² This second package contained a sawed-off shotgun with a barrel length of 10 inches and an overall length of 22 $\frac{1}{8}$ inches (Tr. 339), together with two boxes of shotgun shells.

Respondent was indicted on a single count of mailing a firearm capable of being concealed on the person, in violation of 18 U.S.C. 1715. She was convicted after a jury trial in the United States District Court for the Eastern District of Washington and sentenced to a term of two years' imprisonment.

The court of appeals reversed (App. A, *infra*). In a brief opinion, the court concluded that the pro-

² A handwriting expert testified that, in his opinion, respondent had written the address on the second package (Tr. 356).

vision of the statute forbidding the mailing of weapons "capable of being concealed on the person" is unconstitutionally vague. The court wondered:

Did Congress intend that this "person" be the person mailing the firearm, the person receiving the firearm, or, perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season? We believe that this question, of itself, demonstrates the impermissible vagueness of the statute and its inadequacy to define the intended offense with sufficient specificity. [App. A, *infra*, pp. 2a-3a.]

Finally, the court suggested (App. A, *infra*, p. 3a) that because Congress could have drawn a more specific statute by using numerical definitions it was forbidden to follow any other course.

REASONS FOR GRANTING THE WRIT

The court of appeals has held that the portion of 18 U.S.C. 1715 prohibiting the mailing of firearms capable of being concealed on the person is unconstitutional on its face. In reaching this result the court overlooked the settled principle, reaffirmed last term in *Parker v. Levy*, No. 73-206, decided June 17, 1974, that an ordinary criminal statute such as that here under consideration may not be attacked on its face by one whose conduct is properly subject to its terms. The court of appeals' erroneous invalidation of an Act of Congress on constitutional grounds warrants review by this Court.

Although Section 1715 does not specify how large a weapon must be before it is no longer "capable of being concealed on the person," some weapons are clearly within the statute's prohibition no matter how the quoted phrase is construed. The statute therefore has some constitutional application free of any assertion of vagueness, and it was improper for the court of appeals to conclude that it was void on its face. The statute's potential for uncertain application to larger weapons properly may be considered only if an appropriate case arises.

1. One of the most firmly established principles of constitutional adjudication is that a litigant properly subject to a statute's command may not contend that it is vague or overbroad as applied to others.³ In the case of a criminal statute not affecting First Amendment interests,

[t]he strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.

United States v. National Dairy Products Corp., 372 U.S. 29, 32.

³ Because of the possibility of a "chilling effect" on protected speech, this Court has been more willing to entertain facial vagueness claims in First Amendment cases. However, no freedom of speech issue arises here, and even in First Amendment cases those whose acts are within the absolute core of the statute's prohibition cannot mount a facial attack. *Smith v. Goguen*, 415 U.S. 566, 577-578; *Broadrick v. Oklahoma*, 413 U.S. 601, 608.

If there is any class of offenses within the statute that properly is subject to prohibition, "the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. [Citations omitted.] And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." *United States v. Harriss*, 347 U.S. 612, 618. Or, to put the matter a slightly different way, "None of [the standards by which vagueness is tested] suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, *supra*, slip op. pp. 21-22.

Under these principles, the court of appeals was not at liberty to consider respondent's facial challenge to Section 1715. The court was required, first, to ascertain whether the statute intelligibly prohibited at least some conduct⁴ and, second, to consider whether, in light of that core of prohibited activities

⁴ A facial attack might be maintainable against a statute that is so vague that "no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614. See also *Lanzetta v. New Jersey*, 306 U.S. 451. But the court of appeals did not conclude that this statute provided utterly no guidance to any potential offender; it held no more than that it was uncertain in its application to some weapons.

and respondent's conduct, the statute could give adequate notice that her acts were forbidden. The court of appeals erred by failing to restrict its consideration to the validity of the statute as applied to respondent. A statute may not be upset on an allegation of vagueness as long as it leaves little doubt as to its application to the particular case. *Cameron v. Johnson*, 390 U.S. 611, 616.⁵

2. We submit that Section 1715 properly gave notice that at least some sawed-off shotguns were not mailable. A sawed-off shotgun with a 10 inch barrel is readily recognizable as a weapon capable of being concealed on the person.⁶ The statute does not require that the weapon actually be concealed, but simply

⁵ Nor is there support for the court's apparent belief that Congress is required to adopt the most precise statute possible. It is sufficient if the statute as enacted enables a person to determine the legality of his proposed course of conduct; the availability of more precise rules is irrelevant.

⁶ The Postal Service has promulgated regulations providing that short-barreled shotguns are "firearms" (39 C.F.R. 124.5 (a) (4)) and that they will be regarded as "capable of being concealed on the person" if they have a barrel length of less than 18 inches and an overall length of less than 26 inches (39 C.F.R. 124.5(a) (5)). Although the regulation provides that larger shotguns also may not be mailed if they have special characteristics making them concealable, the objective numerical definitions are helpful in delimiting that area (well within the statute's outer perimeter) in which there is no difficulty in ascertaining the statute's meaning. Cf. *Grayned v. City of Rockford*, 408 U.S. 104, 110.

The government did not direct the court's attention to this regulation until its petition for rehearing; however, the court was required by 44 U.S.C. 1507 to take judicial notice of the regulation regardless of the government's neglect.

that it be "capable" of being concealed. Such a short weapon is "capable" of being concealed (under a jacket or coat, or even in a hand bag) by a person determined to conceal it. Indeed, such a weapon has been sawed off precisely in order to facilitate such concealment. Because the phrase "capable of being concealed on the person" has a clear, unambiguous core meaning, the court of appeals could not reverse respondent's conviction on vagueness grounds unless it determined that the statute was impermissibly vague in its application to the shotgun that she mailed. That issue should be passed upon in the first instance by the court of appeals, and accordingly we have not presented it in our petition as a question for decision by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

JEROME M. FEIT,
RICHARD S. STOLKER,
Attorneys.

JANUARY 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JOSEPHINE M. POWELL, DEFENDANT-APPELLANT

[August 7, 1974]

Appeal from the United States District Court
for the Eastern District of Washington

OPINION

Before: MERRILL and ELY, Circuit Judges, and
REAL,* District Judge

PER CURIAM:

Appellant was convicted of a violation of 18 U.S.C.
§ 1715 for depositing in the United States mail a
firearm capable of being concealed on the person, to
wit: A sawed-off shotgun.

* Honorable Manuel L. Real, United States District Judge,
Central District of California, sitting by designation.

18 U.S.C. § 1715 provides in its pertinent part:

"Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable. . . . Whoever knowingly deposits for mailing or delivery or knowingly causes to be delivered by mail according to the direction thereon . . . any pistol, revolver, a firearm declared nonmailable by this section . . . shall be fined not more than \$1000 or imprisoned not more than two years, or both."

Appellant attacks her conviction on the basis that 18 U.S.C. § 1715, insofar as it encompasses "... firearms (other than revolvers and pistols) capable of being concealed on the person," is unconstitutionally vague in violation of the Fifth Amendment due process. We agree.

Although little question can be raised as to the concealability on the person of a pistol or revolver in common recognition of the normal limits of their size, the statutory prohibition as it might relate to sawed-off shotguns is not so readily recognizable to persons of common experience and intelligence. *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). The statute refers to "firearms capable of being concealed on the person . . ." Did Congress intend that this "person" be the person mailing the firearm, the person receiving the firearm, or, perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season? We believe that this question, of itself, demonstrates the impermissi-

ble vagueness of the statute and its inadequacy to define the intended offense with sufficient specificity.

To require Congress to delimit the seize of the firearms (other than pistols and revolvers) that it intends to declare unmailable is certainly to impose no insurmountable burden upon it; and its failure to do so is an infirmity in draftsmanship of constitutional proportions.¹

Having decided the unconstitutional vagueness of this statute as it is applied to "other firearms," we need not reach the other assignments of error made by appellant.

The judgment is reversed.

¹ Innumerable State legislatures have met the challenge. *See, e.g.*, California Penal Code § 12001; Oregon Revised Statutes § 166.210; Revised Code of Washington § 9.41.010.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1252

DC C-9634

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JOSEPHINE M. POWELL, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Eastern District of Washington

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

A True Copy
Attest 1/10/75

EMIL E. MELFI, JR., Clerk

by /s/ Ray Hewitt
RAY HEWITT, Senior Deputy

Filed and entered August 7, 1974

5a

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Nov. 4, 1974, Clerk, U. S. Court of Appeals]

No. 74-1252

UNITED STATES OF AMERICA, APPELLEE

vs.

JOSEPHINE M. POWELL, APPELLANT

ORDER

Before: MERRILL and ELY, Circuit Judges, and
REAL, District Judge

The motion for stay of mandate and permission
to file late motion for rehearing and suggestion for
rehearing in banc may be filed.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Nov. 21, 1974, Clerk, U. S. Court of Appeals]

No. 74-1252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JOSEPHINE M. POWELL, DEFENDANT-APPELLANT

ORDER

Before: MERRILL and ELY, Circuit Judges, and
REAL, District Judge

Appellant's motion to dismiss appellee's petition for rehearing and suggestion for rehearing in banc is denied, consistent with our earlier order permitting the filing of that petition.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.



MAY 1 1975

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 74-884

UNITED STATES OF AMERICA,

Petitioner

—v.—

JOSEPHINE M. POWELL,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED JANUARY 17, 1975
CERTIORARI GRANTED MARCH 17, 1975

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 74-884

UNITED STATES OF AMERICA,

Petitioner

—v.—

JOSEPHINE M. POWELL,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**CRIMINAL DOCKET
UNITED STATES DISTRICT COURT**

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1973	
Sep. 13	Filed Indictment—Court ordered \$1,500 bond continued
13	Issued Warrant for Arrest of Defendant
17	Filed Warrant for Arrest of Defendant
Oct. 1	Arraigned—PLEA NOT GUILTY (S/N)
1	Court ordered bond continued
12	Filed Notice of Substitution of Attorneys (Atty Lawrence Smith for apptd. Atty Donohue)
12	Filed (Deft) Motion for Extension of Time, 10/29/73
12	Filed (Deft) Motion for Discovery Agreed 10/29/73
15	Filed (Deft) Notice of Hearing
18	Filed (Pltf) Motion Requiring Submission of Handwriting Exemplar Ordered Granted 10/29/73
25	Filed Affidavit of Service by Mail
25	Filed (Deft) Motion for Additional Discovery Agreed 10/29/73
29	Filed Voucher for Counseling Services—\$255.00 (Atty Donohue)
Nov. 5	Entrd Order Granting Plaintiff's Motion for Handwriting Exemplar
5	Distr Copies to USAtty & Atty Smith

DATE	PROCEEDINGS
1973	
7	Filed (Deft) Motion to Permit Defendant to Travel to Marian, Illinois
7	Entrd Order Permitting Defendant to Travel to Marian, Illinois
7	Distr Copies to USAtty & Atty Smith
19	Filed (Deft) Motions to Dismiss Ordered Denied 11/19/73
Nov. 19	Filed (Deft) Petition to Obtain Prisoner for Testimony
19	Filed Subpoena—Teresa Bailey
21	Filed Subpoenas—Carol Cornehl, et al
26	Entrd Order (re compliance with subpoena)
26	Entrd Order Denying Motion to Dismiss (Of Deft)
26	Filed (Atty Gen) Motion to Quash Subpoena Duces Tecum (served on Carol Cornehl) ordered denied 11/26/73
26	Filed Subpoenas—Bob McDaniel, et al
27	JURY TRIAL (S/N)
27	Filed Government's Proposed Instructions
27	Filed Jury List (of Challenges)
28	SECOND DAY TRIAL
28	Filed Defendant's Proposed Jury Instructions
29	THIRD DAY TRIAL
30	FOURTH DAY TRIAL
30	Filed Court's Instructions
30	Filed Verdict—GUILTY Referred for presentence investigation

DATE	PROCEEDINGS
1973	
	30 Court ordered bond continued
Dec. 4	Filed (Deft's) Motion for New Trial, Motion Arrest of Judgment, and Motion for Judgment N.O.V. Ordered Denied 12/14/73
	4 Filed Subpoena—Charles E. Westbrooks
	6 Filed Notice of Hearing
17	Sentenced—2 yrs. impr. (S/N)
19	Entrd Judgment and Commitment CrOB-4-
19	Distr Copies to USAtty, Marshal, Prob. & Atty Smith & PO
19	Filed NOTICE OF APPEAL
19	Distr Copies of Notice of Appeal to USAtty, Atty Smith, Deft, Court Reporter Sturdevant & Marshal
19	Mailed copy of docket entries w/copy Notice of Appeal to 9CCA
19	Filed Bail Bond Pending Determination of Appeal —\$1500—Resolute Insurance Co.
1974	
Jan. 9	Filed (Deft) Motion for Appointment of Counsel Under Rule 44 Ordered Granted 1/14
	9 Filed Notice of Hearing
11	Filed Affidavit of Josephine Powell in Support of Motion Under Rule 44 for Appointment of Counsel
17	Entrd Appointment (of Atty Moberg) (for Appeal) (mailed copy to 9CCA)
18	Entrd Order Authorizing Withdrawal of Attorney (Atty Smith)

DATE

PROCEEDINGS

1974

- 18 Distr Copies to USAtty & Atty Smith
- 24 Filed Voucher for Counseling Services—\$90.00
- 24 Filed Defendant—Appellant's Designation of Record on Appeal
- 28 Filed (Deft) Motion and Affidavit for Extension of Time to Docket Appeal
- 28 Entrd Order Extending Time (2/13/74)
- 28 Distr Copies to USAtty, Atty Moberg, 9CCA and Court Reporter Sturdevant
- 28 Filed Affidavit of Mailing
- Feb. 8 Filed Reporter's Transcript—Transcript of Trial Proceedings (11/27, 28, 29, & 30/733 (two volumes)
- 8 Forwarded Record on Appeal to 9CCA
- Mar. 11 Filed Authorization (for Court Reporter Sturdevant)
- 11 Filed Voucher for Expert or Other Services—\$952.20
- 28 Filed Defendant-Appellant's Additional Designation of Record on Appeal
- 29 Forwarded Supplemental Record on Appeal to 9CCA
- Apr. 22 Filed (Pltf) Motion and Affidavit for Supplemental Record on Appeal
- 23 Entrd Order Directing Clerk to Supplement Record on Appeal
- 23 Distr Copies to USAtty & Atty Moberg

DATE	PROCEEDINGS
1974	

23 Forwarded Second Supplemental Record On Appeal to 9CCA

ATTEST: A True Copy
J. R. FALLQUIST, Clerk
United States District Court
Eastern District of Washington

By /s/ Barbara A. Severance
Deputy Clerk

[SEAL]

Presented to the Court by the Foreman
of the Grand Jury, in open Court, in
the presence of the Grand Jury and
filed in the United States District Court
for the Eastern District of Washington
Sep. 13, 1973.

J. R. FALLQUIST, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-9634

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOSEPHINE M. POWELL, DEFENDANT

Mailing of Non-Mailable Firearm
VIO: 18 USC § 1715

INDICTMENT

The Grand Jury charges:

That on or about the 7th day of March, 1973 at
Spokane in the Eastern District of Washington, JO-
SEPHINE M. POWELL unlawfully and knowingly did
deposit in the Post Office at Spokane, for mailing and
delivery to Teresa Bailey at Tacoma, Washington a fire-
arm capable of being concealed on the person, to-wit: a
sawed-off shotgun, in violation of Title 18 USC § 1715.

A TRUE BILL

/s/ Lanning C. Mills
Foreman

DEAN C. SMITH
United States Attorney

DATE: September 12, 1973.

[TRIAL PROCEEDINGS, NOVEMBER 27, 1973]

[TESTIMONY OF THERESA ANN BAILEY]

* * * *

[4] (The exclusionary rule was invoked, with the exception of Mr. Lewis for the plaintiff; and Mr. Hoots for the defendant.)

(Plaintiff's opening statement was made to the jury, not transcribed herein.)

PLAINTIFF'S CASE IN CHIEF

THERESA ANN BAILEY,

called as plaintiff's witness, being first duly sworn, testified as follows herein,

BY THE CLERK:

Q Would you please state your full name for the jury and the Court, please?

A Theresa Ann Bailey.

DIRECT EXAMINATION

BY MR. CRUM:

Q I will ask you to speak loudly so that the Court and the members of the jury can hear you. Now, your name is Theresa Ann Bailey, you said?

A Yes.

Q What is your present address?

A 1718 South 65th, Tacoma, Washington.

Q How long have you resided at that address?

A Over a year.

[5] Q Are you married?

A Yes.

Q Do you have any children?

A Yes, three.

Q What are their ages?

A Three, four and six.

Q Do they live with you?

A Yes.

Q Are you employed outside of your home?

A No.

Q You stated you are married. What is your husband's name?

A George.

Q George Bailey?

A Yes.

Q Does he live with you and your children?

A No.

Q Where does he live?

A McNeil Island.

Q He is an inmate of that institution?

A Yes.

Q I take it he has been convicted of a federal crime?

A Yes.

Q What was that crime?

A Forgery.

[6] Q Do you recall what the date of his conviction was, approximately?

A October, '71.

Q Where was he convicted?

A Seattle.

Q And at that time he was sentenced to prison?

A Yes.

Q Did he go directly then to McNeil Island?

A No, he went to Lompoc, California.

Q A federal institution in California?

A Yes.

Q How long did he remain at Lompoc?

A Until July of '72. Then he was transferred to McNeil.

Q Do you recall the approximate date that he arrived at McNeil?

A It was sometime in July.

Q Of what year?

A '72.

Q 1972. Has he then been at McNeil Island since approximately July of 1972?

A Yes.

Q He is there at this time?

A Yes.

Q Where is McNeil Island Penitentiary located?

A It is right out of the town of Steilacoom.

[7] Q Is that near Tacoma?

A Yes.

Q And your home is in Tacoma?

A Yes.

Q How far is the island, the penitentiary, from your home?

A About a fifteen minute drive.

Q Do you visit your husband at McNeil Island?

A Yes.

Q How often do you visit him?

A Four times a month.

Q Mrs. Bailey, I am going to direct your attention to the month of February of 1972. This past February. More specifically, the latter part of February of 1972, were you at that time living at your present address in Tacoma?

A Yes.

Q Your husband at that time was also in McNeil Island?

A Yes.

Q During this period of time that I referred to, did you receive what you regarded as a somewhat unusual package through the mail?

A Yes.

Q Was this package delivered to your home?

A Yes.

Q To whom was it addressed?

[8] A Mrs. Bailey.

Q To you?

A Yes.

Q To your knowledge did the package bear a return address?

A Yes.

Q Do you recall what the return address was?

A No.

Q Do you recall either the city—

A It was from Spokane, Washington.

Q You noticed that when you received the package, it was from Spokane?

A Yes.

Q But you don't recall the—

A The address.

Q —the address. But you say there was an address on the package?

A Yes.

Q How about the name of the party who sent the package, was that on it?

A No, it was not.

Q Do you have friends or relatives in Spokane?

A I have relatives but I have never seen them since I was a little girl.

Q So, there is no one in Spokane that you can think of who would be sending you such a package?

[9] A No.

Q Would you describe the package?

A It was long and heavy.

Q How was it wrapped?

A It was in brown paper with strings around it, as I recall.

Q When you received this package, was it left on your doorstep, or handed to you?

A The mailman came to my door.

Q Did you sign any sort of receipt for that package?

A Yes, I did.

Q Mrs. Bailey, I am showing you what is marked for identification as Plaintiff's Exhibit 1. Can you tell me whether or not you recognize that?

A Yes.

Q What does it appear to be to you?

A My signature is on the bottom, where I signed for the package.

MR. CRUM: I move for the admission of Plaintiff's Exhibit 1, your Honor.

THE COURT: Has counsel had a chance to examine it?

MR. MOBERG: I haven't had a chance to see it, your Honor.

THE COURT: Look at the proposed exhibit.

MR. MOBERG: May it please the Court, I'm going [10] to object to the entry of that on the basis that there is not only Mrs. Bailey's signature but there is some other writing on there. There is no evidence or proof of any sort how that other writing got there, who put it there, or what it stands for, or anything else. I think all you have there is a piece of paper with a signature on it, and it is stamped. On that basis we will object to the admission.

THE COURT: Would you clear up the question of the other writing?

BY MR. CRUM:

Q Mrs. Bailey, do you recall the date that you received this package?

A March 28.

Q March 28?

A Yes, sir.

Q Could it have been February 28?

A I mean February 28, I'm sorry.

Q It was delivered to you by a postal inspector and you at the time you received it signed a receipt, did you not?

A I signed this here (indicating).

Q That is the receipt you signed on February the 28th when you took possession of that package?

A Yes.

[11] Q Do you recall whether or not the slip was filled out as it is there the day of the delivery?

A Yes, because I asked him where I signed at, and he told me to sign there at the bottom, because he asked me if my name was Mrs. Bailey.

MR. CRUM: Your Honor, I think we have shown essentially, through Mrs. Bailey, the contents of that slip.

THE COURT: Let me see it.

I think counsel's problem had to do with some writing at the top.

MR. MOBERG: On the bottom.

MR. CRUM: I do have a witness who can clarify that.

MR. MOBERG: Might I inquire on voir dire?

THE COURT: Yes, you may.

MR. MOBERG: I assume that there is some ink writing on the top that looks like the inspector's identification. We are not going to require the United States to prove the identification of this document. Our objection is to the penciled-in writing.

VOIR DIRE EXAMINATION

BY MR. MOBERG:

Q Mrs. Bailey, now your testimony was that this document, marked Exhibit 1, was all filled in?

[12] A Uh-huh.

Q You remember that because of the date and that you said you were Mrs. Bailey?

A (Witness nods)

Q Do you recall other than, say, refreshing your memory from that piece of paper, the date that you received that package?

A Yes, it was February 28.

Q Do you recall a prior discussion that you and I had in Tacoma, Washington?

A Uh-huh.

Q At that time I introduced myself as counsel for the defendant, and we talked about this case, is that correct?

A Yes.

Q Do you recall whether or not at the time I asked you about the questions of this date that you received the first package?

A I believe you did. I can't—

Q Did you give me the date at that time?

A I don't remember if I did or not.

Q Would it refresh your memory if I recalled some of the circumstances of that discussion at that time? Did you or did you not tell me that you were trying to forget the date, and that you didn't know when you received it?

[13] A I did, because it upset me quite badly.

Q At this point you remembered the date of the package. Is that because you read it on that slip?

A No.

MR. MOBERG: I submit, your Honor, that the witness's identification of this is simply what it represents to her. I don't think from her own recollection she can testify that that thing was filled out in this writing at all.

THE COURT: I think it goes to the weight.

* * * *

DIRECT EXAMINATION (Continuing)

BY MR. CRUM:

Q Now, Mrs. Bailey, that document there does reflect what information, could you tell the jury? Go ahead and look at it and tell us, does it tell that a package [14] was mailed to you?

A Yes.

Q And what date does it reflect on there that the package was received?

A The 28th.

Q Of what month?

A Of February.

Q What does it say?

A Second-28-73.

Q Does it indicate on there where the package came from?

A Spokane, Washington.

Q Now, with respect to this package, and we are talking about the package that you signed for here, Mrs. Bailey, did you open that package?

A Yes, I did.

Q What did it contain?

A Two guns and some shells—two shotguns and shells, and hacksaw blades.

Q Were you expecting a package of this sort?

A No, I was not.

Q Now, Mrs. Bailey, you testified there were two shotguns in this package, among other items. What

condition were the shotguns in when you opened the package?

A They were broken down.

Q I am showing you what is marked for identification as [15] Plaintiff's Exhibit 2. Can you tell me whether or not you recognize that exhibit?

A The barrel.

Q You recognize the barrel. How do you recognize the barrel?

A Because I picked it up and looked at it.

Q When you opened the package?

A Yes.

Q You are saying you recognize that barrel as being the barrel you picked up when you received the package on February 28?

A Yes.

Q Well—are you positive that is exactly the same?

A No.

Q Does it appear to be similar to the barrel you picked up on the 28th?

A Yes, it does.

Q Did you pick up any other parts of that weapon?

A No.

Q So, you are unable to say that the other items also marked as Exhibit 2, are items received by you on February 28th, you are unable to say that?

A Right, yes.

Q You say you picked up that barrel. What did you notice when you picked up the barrel?

[16] A The two holes on it.

Q You mean the fact that it is a double-barreled—

MR. MOBERG: Your Honor, I object. I think counsel is leading the witness and doing a bit of testifying on his own.

MR. CRUM: Two barrels signify double, your Honor, I don't think that is leading.

THE COURT: Rephrase your question.

BY MR. CRUM:

Q You are saying you recognize that weapon there as the same because it has two holes in it.

A Yes.

Q All right. Now, Mrs. Bailey, I am showing you what is marked for identification as Plaintiff's Exhibit 3. Do you recognize that exhibit?

A The handle of it, the butt part of it.

Q How do you recognize it?

A By this marking down here at the bottom.

Q Does that appear to be similar to the same shotgun that you testified was in that package you received on February 28?

A Yes.

Q Did you pick that shotgun up?

A No.

Q Did you look at the barrel of that shotgun?

[17] A (Witness nods)

Q Was it in the same condition when you received it?

A It was broken down.

Q You are saying that the only thing that looks the same to you is the handle?

A The handle.

Q So you cannot tell us this is positively the gun you received when you got the package on February 28?

A No.

Q But it does appear similar?

A Yes.

Q All right. Now, Mrs. Bailey, you, I believe, indicated there were other items in that package. What were the other items?

A Two packages of shells and hacksaw blades.

Q What sort of shells?

A Shotgun shells.

Q Showing you what is marked for identification as Plaintiff's Exhibit 4, could you take a look at that exhibit and tell us what it appears to be?

A Both of these?

Q I believe that is 4, there.

A (Witness looks at proposed exhibit) Shells.

Q Let's leave it at that for a moment, Mrs. Bailey. You can take it out of there.

[18] A This out of here?

Q It can be taken out. Now, the shotgun shells you referred to in your testimony, were they in packages?

A They were in boxes.

Q Does that package appear to you to be similar to the case the shotgun shells were received in?

A Yes, except they weren't in plastic.

Q You are not able to tell us those are the identical shells you received in the package?

A No.

Q But they appear similar to the ones you received on February 28?

A Yes.

Q Now, if you would take a look, if you would at what has been marked as Plaintiff's Exhibit 5,—

MR. CRUM: I would like to have that marked as 5, if I could.

THE CLERK: I marked them both 4.

MR. CRUM: I would like that marked 5, if I could.

BY MR. CRUM:

Q Would you tell us what Proposed Exhibit 5 appears to you to be?

A Hacksaw blades.

Q Would you pull it out of the package.

A (Witness removes objects from package)

[19] Q Do those appear to be similar to those—

MR. MOBERG: Your Honor, I object again on the same grounds, that most of the testimony is by the United States Attorney and not by the witness. I would like to hear what the witness has to say.

THE COURT: I think this question is all right.

Q Do they appear similar to the blades you received on February 28?

A Yes, except they were in individual packages.

Q Do you recall how many blades there were?

A No, I didn't count them.

Q Approximately.

A Twenty or thirty, I don't know.

Q You can't tell us those were the same blades in the package?

MR. MOBERG: I object again, your Honor. The United States Attorney is putting words in the witness's mouth.

THE COURT: Overruled.

Q You cannot tell us those were the same blades that you received on February 28th?

A No, but they appear to be the same.

Q I believe you said the condition of the shotguns that had been shown you here were essentially the same as the shotguns you received, that is, broken down?

[20] A Yes.

Q What did you do with these items that you have seen here in court after you opened the package?

A I put them in my closet, away from my children. And then I went over—on the 2nd I went over and talked to my husband about it.

Q Well, you put them in your closet. What did you do with the wrapping paper?

A I threw it in the garbage because I had tore it off and I put it in the garbage can.

Q Then you put the items in the closet?

A Yes.

Q Then what action in response to the receipt of these items did you take?

A I went over to see my husband and talked to him.

Q What was the purpose of that visit?

A I wanted to know if he sent these or what was happening, and he swears to God he did not send them to me.

Q After you visited with your husband, did anyone contact you relative to this package you had received?

A I got a phone call the next day from Mr. Hicker, and Mr. Byrd.

Q Who is Mr. Hicker?

A An FBI agent for McNeil Island.

Q Mr. Hicker is an FBI agent?

[21] A Yes.

Q How about Mr. Byrd?

A FBI agent in Tacoma.

Q Following your telephone call, did you speak with both Mr. Hicker and Mr. Byrd?

A I talked with Mr. Hicker.

Q Did you have occasion—did you know Mr. Hicker?

A Yes.

Q Did you ever have an occasion after this phone call to meet personally with Mr. Hicker?

A I did when I took him the guns, I met him.

Q Okay. Do you recall when that was?

A It was on the 3rd.

Q The 3rd of March?

A Yes.

Q 1973?

A Yes.

Q You took the contents of the package that you received on February the 28th to Mr. Hicker?

A Yes.

Q Was anyone with Mr. Hicker?

A Mr. Byrd.

Q Where were they?

A Behind the mall in the parking lot.

Q In Tacoma?

[22] A Yes.

Q Did you turn the contents of the package over to him at that time?

A Yes.

Q What was it that you turned over to him?

A Two shotguns, shells, and hacksaw blades.

Q Now, directing your attention, Mrs. Bailey, to the 9th day of March, of 1973, does that date stick in your mind?

A Yes.

Q Did you receive a phone call from anyone on that date?

A I received a phone call from a woman.

Q On March 9?

A Yes. Telling me—

Q Do you recall the time of day?

A Between 2:30 and 4:00 o'clock.

Q How can you be sure of that?

A Because I just came back from seeing my husband.

Q Did the caller identify herself?

A No.

Q What was the substance of the conversation?

A She told me—

. . . .

[24] PROCEEDINGS RESUMED WITHIN THE
HEARING OF THE JURY:

BY MR. CRUM:

Q First of all, did the woman identify herself?

A No.

Q Would you tell us what the conversation was?

A She asked me if I was Theresa Bailey and I said yes, and she said a second package was coming, and it was a mistake. I was to give the second package to Sally, and I said I did not have an address or any way of giving it to Sally, and she said all right, she would call me back.

Q Did you know Sally?

A No.

Q And did you recognize the voice?

A No.

Q After you received the phone call did you take any action?

A I called Mr. Hicker and told him. He said yes, I had another package and he told me I wouldn't get it.

[25] MR. MOBERG: Objection. She can't testify what Mr. Hicker said.

THE COURT: The objection is well taken.

Q But you did contact Mr. Hicker?

A Yes.

Q Other than that, did you have any other personal contact with Mr. Hicker?

A Only my phone, until the package came.

Q Now, Mrs. Bailey, what was your telephone number on March 9?

A GRQ-97-97.

Q Was that an unlisted phone number?

A No.

Q Did you receive any other calls from this woman?

A No.

Q Or from a woman?

A No.

Q And you had not received a second package at the time this call was made?

A No.

Q Did you subsequently receive a second package?

A Yes.

Q Do you recall the date you received that second package?

A On the 13th.

Q Of what?

[26] A March.

Q Of 1973?

A Yes.

Q Was the package delivered to your home?

A Yes.

Q Was it left on the front doorstep?

A The mailman handed it to me.

Q Did you sign a receipt for that package?

A No.

Q Who was the package addressed to?

A Mrs. Bailey.

Q Addressed to you?

A Yes.

Q Did it have a return address on it?

A Spokane.

MR. CRUM: I wonder if I might approach the bench just for a moment, your Honor?

PROCEEDINGS AT THE BENCH, OUT OF THE HEARING OF THE JURY:

MR. CRUM: I was thinking about asking her this question. Whether she recalls if the handwriting on the second package was similar to the first.

MR. Moberg: Object to that. She can't even remember the first package.

THE COURT: No, the objection is sustained.

[27] PROCEEDINGS TO THE COURT
AND TO THE JURY:

BY MR. CRUM:

Q Mrs. Bailey, did you open this package?

A No, I did not.

Q What did you do with it?

A I called Mr. Hicker and told him I had the package.

Q Now, Mrs. Bailey, showing you what is marked for identification as Plaintiff's Exhibit 6, can you tell me whether or not you recognize that item?

A Yes.

Q What does it appear to you to be?

A A square package.

Q Have you ever seen it before?

A The day I got it.

Q Is this the package that you have indicated you received on—what date?

A March the 13th.

Q How do you recognize that package?

A Because I initialled it and put the time and the date on it.

MR. CRUM: I will move for the admission of Plaintiff's Exhibit 6 now, your Honor. I believe that counsel has had an opportunity to look over the package.

MR. MOBERG: We have no objection to the admission of the package.

[28] THE COURT: All right. Plaintiff's Exhibit 6 for identification is admitted.

Q Was that package addressed to anyone?

A To me, Mrs. Bailey.

Q What does it say?

A To Mrs. Bailey.

Q What address?

A 1718 Pittsburg, Tacoma, Washington, 98408.

Q Was the package postmarked?

A Yes.

Q What is the date of the postmark?

A March 7.

Q Is there a location from which the package was mailed on the postmark?

A Spokane, Washington.

Q Is there a return address on that package?

A Yes.

Q What is the return address?

A 1753, I believe that is Lee Street, Spokane, Washington.

Q Mrs. Bailey, you are testifying that is the same package you received on March the 13th, 1973?

A Yes.

MR. CRUM: That's all I have with respect to that package.

Q Did you ever open that package?

[29] MR. MOBERG: Just one moment. Let me see the package.

THE COURT: Mr. Crum, it is almost noon. Whenever it is a convenient and logical place to break—

MR. CRUM: I think now would be logical, your Honor.

THE COURT: We will recess for lunch, until 1:30. And again I admonish the jury that they are not to talk about the case or to discuss anything about it because you have not heard all of it yet, so Mr. Bailiff, would you retire the jury, and please report back to your jury room by 1:30.

(Jury out at 12:00 o'clock noon.)

THE COURT: The court will be in recess until 1:30.

* * * *

[30] (Jury in at 1:39 p.m.)

THE COURT: You may continue.

DIRECT EXAMINATION (Continuing)

BY MR. CRUM:

Q Mrs. Bailey, I believe we left off when I asked you whether or not you ever saw the contents of that second package.

A No.

Q And you did not. Did you know anyone who resided at 1753 North Lee in Spokane?

A No, I do not.

Q Do you know Josephine Powell?

A No.

Q Had you made any arrangements with anyone to receive either of these two packages that you testified to?

A No, I did not.

Q During that time have you received any other packages from anyone in Spokane?

A No.

[31] MR. CRUM: I believe that is all I have for now, your Honor.

CROSS EXAMINATION

BY MR. MOBERG:

Q Mrs. Bailey, you have three children, is that correct?

A Yes.

Q Are these children from your marriage to George Bailey?

A Yes.

Q These children are living at home?

A Yes.

Q The youngest one is three?

A Yes.

Q You say that you are unemployed. Have you worked at any time, say, in the last two years?

A No.

Q You have been a housewife at home?

A Yes.

Q How long have you lived with your husband?

A Seven years—well, seven years in August.

Q And the last time, am I correct, I assume the last time you lived with him was October of 1971?

A Yes.

Q And he has been in either Lompoc or McNeil Island since then?

A Yes.

[32] Q Now, how many months has your husband been in McNeil Island?

A Since July of '72.

Q A little over a year?

A Yes.

Q During that time you have visited him quite frequently, is that correct?

A Yes.

Q Now, you stated I believe in your direct examination that you received a package, which we will call the first package.

A Yes.

Q On February 28, 1973.

A Yes.

Q And you are certain that is the date you received it?

A Yes.

Q And it couldn't have been the 27th, or the 5th of March, it was on February 28, 1973?

A Yes.

Q How are you certain that was the date?

A Because it was on a Wednesday.

Q How are you certain it was a Wednesday?

A Because I had gone somewhere, I can't remember exactly where I was at, and I was waiting for my check. It comes on the 1st.

[33] Q Because you were going somewhere and your check comes on the 1st. You are certain you received the package on—

A Yes.

Q Now, had you either on this morning or yesterday afternoon or any time in the last couple of days met with Mr. Crum and talked about this case?

A Yes.

Q And did you meet with some of the other witnesses in this case?

A Yes.

Q And did they refresh your memory as to dates or anything like that, or supply you information of what they thought were the dates, or what happened?

A No. Mr. Crum talked to me about it.

Q Was Mr. Crum attempting to refresh your memory so that you would remember these dates?

A He asked me if I remembered these dates.

Q Now, you understand I am not making any—trying to suggest anything of Mr. Crum or yourself or anybody, but you realize that my client, the defendant in this case, is charged with a serious crime?

A Yes.

Q And you also realize that your testimony plays a big role in this charge and her innocence of her guilt?

[34] A Yes.

Q And it is important that you testify to what only you remember, what you observed, and not what someone might have told you that you subsequently remember as being the truth, do you realize that?

A Yes.

Q Do you also recall about the visit that I had with you a couple of weeks ago in Tacoma?

A Yes.

Q And I was there and you were there, and I believe there was one other gentleman there, is that correct?

A Yes.

Q What was his name, by the way?

A James Finney.

Q James Finney?

A Uh-huh.

Q Now, do you recall that I asked you the question on the 28th, what date you may or might have received a package?

A Yes.

Q And do you recall what your answer was?

A I said I didn't quite remember the dates because I was trying to forget all this.

Q Would it be fair to say from that conversation you didn't remember any dates at all?

[35] A Well, at the time I didn't, no.

Q But now you are certain that February 28th is the date you received it?

A Yes, because after I have gone through this and been thinking about it by myself, then I remembered.

Q Now, this first package that you received, what was the first thing you did when you got the package?

A Opened it after I signed for it.

Q Opened it right away?

A Yes.

Q Your testimony is that it was from Spokane?

A Yes.

Q How did you know that?

A Because it was on the corner of the box.

Q What was on the corner of the box?

A Spokane, and the address that I can't remember.

Q At that point did it strike you as curious that you were receiving a package from Spokane?

A Yes.

Q But you proceeded to open it?

A Yes.

Q On opening it, you found some contents in that package, is that correct?

A Right.

Q What do you recall was in that package?

[36] A Two shotguns, shells, and hacksaw blades.

Q Two shotguns, shells, and—

A Two shotguns, the shotgun shells, and the blades.

Q Now, that was what time of day on the 28th of February that you received this package?

A In the afternoon.

Q And that was a Wednesday?

A Yes.

Q What is the next thing you did after you opened the package and saw the contents?

A Closed the box and put them in my closet. I picked up the wrapper and threw it in the garbage.

Q Why did you put it in your closet?

A Because of my children.

Q You closed the box and put it in the closet, that was sometime in the afternoon, and then what did you do?

A I waited for two days.

Q You just waited for two days?

A Uh-huh.

Q You received this package that contained these items that you weren't expecting, and from someone you didn't know, and you put them in your closet and waited for two days?

A I wanted to talk to my husband before I did anything about it because I didn't know what it was meant for.

[37] Q Why did you want to talk to your husband?

A Because I thought maybe he sent them.

Q Are you positive that he didn't send them?

A No, because he swears he did not.

Q You didn't call Mr. Hicker at that time, did you?

A No.

Q And you didn't call Mr. Byrd of the FBI?

A No.

Q Or any local authorities?

A No.

Q At that point did you think your husband had sent them to you?

A I thought maybe he had sent them, yes.

Q Why did you think that?

A Because they were there and that was the first thing that came to my mind, that maybe he sent them. I didn't know.

* * * *

[38] Q Now, it was also your testimony that you did not know the defendant in this case, Josephine Powell?

A No, I don't.

Q And you have never seen her before?

A No.

Q And you had nothing to let you know or any kind of tip-off or indication that you were going to receive a package like that?

A No.

Q It just came out of the blue?

A Right.

* * * *

[46] A I got a phone call from a woman saying that I was to—

Q Just a moment. Did you get a phone call?

A I got a phone call, yes.

Q You know it was from a woman?

A Yes.

Q You are certain about that?

A Yes.

Q It couldn't have been from a man?

A No.

Q What time?

A Between 2:30 and 4:00 o'clock.

Q How do you remember that it was between 2:30 and 4:00 o'clock?

[47] A Well, it was right after I got home and there's a program I watch on TV, that I watched.

Q Right after 2:30. From 2:30 to 4:00 o'clock, that's several hours.

A Maybe it was closer to 4:00 o'clock, 3:30 or 3, somewhere in there.

Q Do you have any idea when that phone call was made?

A Not exactly, no.

Q But you're certain it was between 2:30 and 4:00 o'clock?

A Yes.

Q It could have been a minute after, say 2:35 or 2:40, and you don't know?

A I don't know.

Q What day was this?

A The 9th.

Q You are certain about the date?

A Yes.

Q Why are you certain about the date?

A Because of what was said on the phone.

Q Because of what was said on the phone?

A When she called me.

Q Now, would you tell us what was said on the phone. Did they say hello, this is March 9?

A No, because I had just come back from seeing my husband.

A And that was how you remember it was March the 9th?

[48] A Yes.

Q You previously testified there was some discussion on the telephone.

A Yes.

Q What was that discussion?

A She asked me if my name was Theresa Bailey, and I said yes. She said I was getting another package, it was a mistake, I was to take the first one to Sally, and I told her—

* * * *

[52] Q So what did you do after you received this phone call?

A I called Mr. Hicker.

Q You called Mr. Hicker. He didn't call you again?

A No, I called him.

Q And what did you tell Mr. Hicker?

A That I had just got a phone call from a woman and I was supposed to be getting another package and I was supposed to take the first one to Sally, or something, and he told me I would not be getting a second package, and that they already had it.

Q Who is he?

[53] A Mr. Hicker.

Q In your phone conversation he said you wouldn't be getting another package?

A He said they had already got it, they had already stopped it.

Q Who had already got it?

A The postal, or people—he didn't say. He just said I would not be getting the other package.

Q That was on March 9?

* * * *

[54] Q If I am correct, in your testimony you found out that [55] you were going to receive another package and from this phone call, and immediately you called Mr. Hicker and found out he already knew?

A Uh-huh.

Q Did you receive the second package?

A Yes.

Q How was that package delivered?

A It was on the 13th of March, that square package there.

Q How did it arrive.

A By the postmaster.

Q It was on the 13th of March?

A Yes.

Q Is it fair to say you became absolutely certain of that date?

A Yes.

Q Would it be fair that you became certain of that date since I talked to you a couple of weeks ago?

A Yes.

Q You weren't sure a couple of weeks ago what that date was.

A I couldn't remember, no.

* * * *

[60] Q So in subsequent visitations you might have had with your husband, did you discuss this matter that happened between the 28th and the 13th?

A Do you mean all of this?

Q Did you discuss this whole incident after that, or did you forget about it, or let it pass?

A No, we didn't discuss all of it. We had discussed some of it.

Q At any time had you discussed plans of escape with your husband?

A No.

Q Had he ever discussed them with you?

A No.

Q Did you ever make any comment in your visitations, before or after this time, that there was something going on in the prison?

A No.

Q That you were going to receive some packages?

A No.

Q Or that he would like to try some escape method?

A No.

Q You are certain about that?

A Yes.

Q Do you recall a discussion two weeks or close to two weeks ago?

[61] A Some of it, yes.

Q Do you recall at that time—strike that. At that time did you make any statement to me about possible escape plans?

A I didn't say he made escape plans. I remember what I said to you.

Q Would you tell me what that was?

A I told you there was supposed to be some saw blades sent to me, but that was it, no further discussion about it. That was way before this happened.

Q I appreciate that, way before. How long?

A Two or three or four weeks.

Q And your husband made some comment to you that you were going to receive some blades?

A He asked me if I would take them, and I said no, and there was no further discussion about it.

Q That was two or three weeks before this?

A It was along in there before this ever broke out.

Q Did he just bring this up in the blue, that one time?

A No.

Q That was all that was said?

A No.

Q Didn't you inquire, weren't you curious at that time?

A No.

Q Did he ever talk to you about it subsequently?

[62] A No.

Q Did you bring up that discussion you had that four weeks ahead of time, with him at the time you received the first package on the 28th?

A No.

Q You waited until the 3rd. You waited until you talked to your husband before you did anything, is that correct?

A (No answer)

Q At that point did you discuss this or other comments he made to you?

A No.

Q And it didn't even stick in your mind?

A No.

* * * *

Q Now, back to these phone calls on the 9th, was that the only phone call you received in regards to this incident?

A No, I got some on the 14th that were threatening.

Q You got threatening phone calls on the 14th. By a man or a woman?

A Man.

[63] Q How many?

A Three.

Q Do you know where those phone calls came from?

A No.

Q Were there any other phone calls?

A Just off and on.

Q All these phone calls were in three days?

A Yes.

Q They were by a man?

A Yes.

Q And this one call in the night, and these three calls from a man on the 14th or something like that—

A The 14th.

Q —were there any instructions in those phone calls?

A No.

Q Did you report those phone calls to the FBI?

A Yes.

Q Now, these were made by a man.

A Yes.

Q Did that man identify himself?

A No.

Q Did he know you?

A Yes.

Q Did he call you by your first name?

A Yes.

[64] Q Or did he ask you, is this Theresa Bailey?

A Theresa Bailey.

Q So he knew you?

A Yes.

* * * *

[72] Q You said you have relatives in Spokane, is that correct?

A Yes.

Q Do you ever phone them?

A I don't even know who they are because I was just little. And they were relations.

Q Did you ever make any phone calls to Spokane?

A Not that I know of.

Q For example, say in the last—since the first of the year, would there appear on your phone bills any phone calls from you to Spokane?

A Not that I know of.

Q For example, say in the last—since the first of the year, would there appear on your phone bills any phone calls from you to Spokane?

A There might have been.

Q Who might they have been to?

A I don't remember the phone number.

Q Did you make some calls to Spokane, though?

A I believe I made one, but the people weren't home and I don't remember the number or the people.

Q You just called Spokane out of the blue?

A Yes.

Q Did you ever talk to anybody in Spokane?

A The people I was supposed to talk to weren't home, so I never—

Q It showed up in your phone bills, did it not?

A Yes.

[73] Q Unless you talked to somebody it wouldn't show up in your phone bill. Your testimony is that you

made a phone call to Spokane. When was this phone call made?

A I don't remember.

Q January?

A I don't remember.

Q February?

A I don't remember, I just remember there was one made.

Q You made one call.

A Maybe two.

Q Maybe two phone calls to Spokane?

A I don't remember, two, somewhere in there.

Q Would it have been in the wintertime?

A I guess so.

Q Would they have been in January?

A I can't remember.

Q Do you have your phone records with you?

A No.

Q So you made maybe two phone calls to Spokane?

A Uh-huh.

Q And those phone calls showed up in your bill but you didn't talk to anybody?

A I didn't talk to the people, no.

Q You talked to somebody?

A I talked to somebody but the people I was supposed to [74] talk to weren't home.

Q Do you remember why you were calling?

A No. A message that McNeil wanted to see somebody there.

Q McNeil wanted—

A That their husband wanted to see them at McNeil.

Q Whose husband?

A I don't know. I don't remember the name. I just threw it away.

Q Who gave you the message, her husband?

A Yes.

Q When you were visting?

A I called them to tell them her husband wanted to see them, that was all.

Q Was there any discussion that you had on the phone other than that?

- A No. You know, this person isn't here, and goodbye.
- Q Was there any discussion about some papers or anything like that?
- A No.
- Q As you recall there were two phone calls?
- A Yes.
- Q To people you didn't know?
- A I don't know.
- Q And you don't remember when?
- A I don't remember when, either.
- [75] Q And you didn't talk to the people anyway?
- A No, they weren't home.
- Q Your husband asked you to call them?
- A Yes.
- Q It was sometime in January?
- A I don't remember what it was. I threw it all away.
- Q Did you do anything else at your husband's request in terms of dealing with people in Spokane?
- A No.
- Q Do you recall the phone number?
- A No.
- Q Was it a call to Josephine Powell?
- A No.
- Q You didn't know her, did you?
- A No.
- Q So it was a call to somebody else?
- A I can't remember the name.
- Q You don't remember the name?
- A No.
- Q And you just had to give them a message to be at McNeil Island?
- A Yes.
- Q And that was all?
- A That's all.
- Q Are there phone privileges out of McNeil Island, can [76] they call out?
- A Yes.
- Q Did your husband tell you why you should do this instead of someone calling from the Island, to tell them to come and visit?

A No. He said call and I said I can't see any harm in calling. I was to tell them their husband wanted to see them.

Q You were just doing this—

A As a favor.

Q You might have called them twice? Have you called them any more than twice?

A No, I just threw it all away.

Q The two phone calls were not in the same day?

A Yes.

Q And you called and then you called back again on the same day?

A No—yes.

Q Either time did you get the person you wanted to talk to?

A Not the person I wanted to talk to, no.

Q But you did get somebody?

A I got somebody.

Q Did you have any further discussion or any discussion at all with your husband about doing errands for him [77] or doing things for him, or supplying him with any tools?

A No.

Q Except the one in February?

A No.

Q Did he indicate to you that anything was going on at that time inside the prison?

A No.

Q He just out of the blue thought if you would happen to get some hacksaw blades you would bring them in?

A Yes.

* * * *

[78] REDIRECT EXAMINATION

BY MR. CRUM:

Q Mrs. Bailey, as you recall on direct examination I asked whether or not you had any friends or relatives in Spokane.

A Uh-huh.

Q Do you recall that?

A (No answer)

Q And your answer was that you had some relatives but had not had any contact with them since you were a young child, is that right?

A Yes.

Q In cross examination, Mr. Moberg referred to some telephone calls made by you to someone in Spokane. You made how many phone calls?

A I forgot about those until he asked me.

Q How many phone calls did you make?

[79] A Two, I believe.

Q You don't recall the name of the party you were calling?

A No.

Q Do you recall whether or not it was the wife of one of the fellows in the institution with your husband?

A I can't even remember the name of it.

Q What was the message that your husband gave you?

A That somebody wanted them to come over and see them.

So you were calling a wife. Do you know whether or not it was a wife?

A No, I don't know.

Q Or a daughter?

A I remember I had a name but I threw all of that away. I can't even remember what it was.

Q Was it a man or a woman you were trying to contact in Spokane?

A I talked to a woman I believe.

Q Who were you trying to contact, a man or a woman?

A I was supposed to be talking to either one, I believe.

Q Who in fact did you talk to?

A A woman.

Q What did you tell her?

A That she was wanted, there was a visit to be over at McNeil.

Q Why did you make a second phone call?
[80] A The first one they weren't home.

Q Who was it that answered the phone?

A A girl, I believe.

Q You asked for a certain party and they said that this party was not there?

A Yes.

Q You didn't leave a message at that time?

A No.

Q And you called back the same day?

A Uh-huh.

Q On that occasion did you get in touch with the party you were trying to get in touch with?

A Yes.

Q And do you recall whether this was a man or a woman?

A I don't remember.

Q And you gave them what message?

A They wanted to visit over at McNeil.

Q Was there any discussion during the course of the phone call about hacksaw blades or shotguns or an escape plan?

A No.

Q And you made, to the best of your recollection, no other phone calls to Spokane?

A No.

Q All right. Did you or have you discussed with anyone other than the references you have made to the discussions [81] with your husband, about an escape plan at McNeil Island?

A No.

Q You were not part of an escape plan?

A No.

Q Mr. Moberg has indicated on cross examination that all of a sudden you received some telephone calls out of the blue from Mr. Hicker. Now, as I recall, you testified that after you received this first package you went to see your husband at the institution?

A Yes.

Q You inquired of him at that time whether or not he had any knowledge of the contents of this package?

A Yes.

Q And his response was he did not?

A Yes.

Q During the course of your conversation with him then, did he advise you to contact Mr. Hicker, or did the name Mr. Hicker come up during the course of this conversation?

A It did.

Q How did it come up?

A He brought it up, I didn't.

Q In what way did he bring it up?

A That he would go up and talk to Mr. Hicker about it.

Q And did he then indicate that Mr. Hicker would get in touch with you?

[82] A Yes.

Q What was it specifically that he was going to talk to Mr. Hicker about?

A Tell him that I received the package with the gun and blades and bullets in it.

Q Your husband did not indicate to you either at that time that he was part of a plan to escape from McNeil?

A No.

MR. MOBERG: Objection.

THE COURT: Sustained.

MR. CRUM: I don't know, your Honor, I think that is a proper question. I think counsel has opened the door.

THE COURT: The subject matter is all right but it's the form of the question.

MR. CRUM: All right.

Q Did your husband indicate to you during your conversation that he had any knowledge of an escape plan from McNeil Island?

A No.

Q Or did he indicate to you that he was part of an escape plan?

A No.

Q Now, have you ever given your telephone number, which I understand was a listed phone number on March the 9th, [83] 1973, is that correct, was it listed?

A Uh-huh.

Q Have you given that number to anyone for the purpose of facilitating any type of an escape plan?

A No.

Q You are fairly certain of the date you received the package, the second package, that is, because I believe you testified that you initialled that package when you received it, is that correct?

A Yes.

Q And you had some telephone calls with Mr. Hicker from March the 9th up through March the 13th, is that correct or incorrect?

A Did I have some?

Q Did you have at least one phone call?

A Yes.

Q During that period of time did you have perhaps other phone calls from Mr. Hicker during that period of time?

A I don't believe so.

Q You don't recall?

A No.

Q Could there have been other phone conversations you had with Mr. Hicker during that period of time?

A I don't believe so.

MR. CRUM: I believe that is all I have.

* * * *

[87] DIRECT EXAMINATION

BY MR. CRUM:

Q Mrs. Bailey, following your testimony just a few moments ago, you and I met in the hall, did we not?

A Yes.

Q And we had some discussion at that time about these phone calls you testified to that you made to Spokane, is that correct?

A Yes.

Q Now, have you previously at any time mentioned to me the fact that you had made any phone calls to Spokane?

A No, not before I met you out in the hallway.

Q You testified previously that those phone calls were made to parties in Spokane whose names you do not remember. Now, is that testimony true?

A No.

Q What in truth was the fact, the message that you delivered to someone in Spokane?

A The message was that they were supposed to order one dozen escape and invasion blades and close-wound pipes, and I hung up and threw it away.

[88] Q Where did you get the message from?

A My husband.

Q Do you recall who the party in Spokane was that you were to talk to?

A No, I don't really. I can't remember names.

Q You can't remember names. How many phone calls did you make?

A I made three from my home, two of them I couldn't reach the party and the third I got the lady and I told her I would make a phone call from the booth, the telephone booth.

Q Where was the phone booth?

A 56th at a gas station close to my home.

Q When you made the phone call from the booth, was it to the same number?

A Yes.

Q Was it to a lady?

A Yes. One dozen escape and invasion blades and close-wound pipe, and I gave her an address. I can't remember it, and hung up and that was it.

Q Now, you hadn't told me that before, had you?

A No.

Q Is there anything else you have testified to that has not been truthful?

A No.

[89] Q Did you know anything about those two packages that you received?

A No, I did not.

Q Why didn't you tell us the truth about the phone calls to Spokane?

A I don't know, I got scared I guess, nervous.

Q All right. Outside of the discussions you had with your husband about the hacksaw blades and the telephone calls you made, have you had any other discussions at all about hacksaw blades and possible escape or evasion blades or anything at all?

A No, sir.

Q You are telling the truth now?

A I am telling the truth. I swear to God I am telling the truth.

MR. CRUM: That is all.

THE COURT: Further questioning?

CROSS EXAMINATION

BY MR. MOBERG:

Q Mrs. Bailey, after your testimony you left the hall and it is my understanding you then talked to Mr. Crum again?

A Yes.

Q And did you, on your own, come out and say to Mr. Crum that you told me some things that were not true?

A Yes.

[90] Q And did he advise you we should go in and correct those things?

A Yes.

Q Now, you have—

THE COURT: Excuse me just a moment. Can you not hear the witness?

JUROR NO. 5: We are having trouble hearing.

MR. MOBERG: You will have to keep your voice up.

Q So the truth now is that you did make the phone calls to Spokane?

A Yes.

Q And you don't remember who they were to?

A No, I don't.

Q And you said order some one dozen escape and evasion blades?

A Yes.

Q What is an escape and evasion blade?

A I do not know.

Q Did your husband tell you what they were?

A No.

Q Escape indicates escape, doesn't it, used for some kind of escape?

A I suppose, but I didn't know what they were.

Q Your husband didn't explain it to you when he told you?

A No.

[91] Q When was this?

A I don't remember when it was.

Q Did he tell you this around March 9th?

A No.

Q It was before March?

A It was earlier. I don't remember when exactly.

Q February?

A I can't remember because I don't even remember when I made the phone call.

Q These phone calls were made as a result of one discussion you had with your husband and he told you to make these phone calls?

A He asked me if I would make the phone call and I made the phone call.

Q The same day?

A I believe—yes, it was. It was in the evening when I made the phone call.

Q Did he supply you with the name and the number and what to say?

A Yes.

Q Did you ask him about it?

A No.

Q Just seemed like the normal thing to do?

A I don't know what they were.

Q Did you have any idea what they were?

[92] A No.

Q Your husband was then in the penitentiary and he asked for escape and evasion blades?

A He didn't ask for them for himself. It was for somebody else.

Q He asked you to order them?

A He asked for somebody else to order them, not for me. I don't know what escape and evasion blades are and I still don't.

Q You had some idea though?

A No.

Q No idea at all?

A No.

Q You knew they weren't shaving blades?

A Yes.

Q It wasn't a commodity like something you might shave with or deodorant or something like that?

A No.

Q And he had you call to Spokane to get them?

A Yes.

Q And knowing those things, you still don't have any idea what they were or what he intended to do with them?

A No, he did not tell me.

Q You figured, okay, I'll call these people and have them put in the order?

[93] A Yes.

Q And your testimony still is that you had no part in any plan of escape?

A That is right, I had nothing to do with it.

Q Now, Mrs. Bailey, I don't want to appear to be picking on you, and I am not, but I want to get to the truth, and you understand how important the truth is to my client.

A Yes.

Q If you don't like the method that I am asking you questions, if you think I am being unfair with you, just tell me. But I just want to get the real truth of the matter.

A I understand.

Q Would you like a drink of water?

A No.

Q You did have one discussion about escape with your husband on this date that we cannot pin down, in February and about some blades. Was that at the same time he told you to order the escape and evasion blades?

A That was after.

Q In other words, you ordered them, or you made these phone calls, and later you talked to him again, you talked to him twice about blades?

A He didn't talk to me about blades. He asked me to make [94] a call. He said something about escape and evasion blades, and we didn't talk about it any more.

Q You talked to him a second time?

A Yes.

Q Didn't he tell you if you should receive some blades, would you bring them in to McNeil Island?

A Yes.

Q At no point you told him you would?

A Right.

Q What was the time length then between those two discussions?

A I don't remember. I honestly don't remember.

Q It wasn't anything that you would want to remember, is that it?

A Right.

Q It is something you would like to forget?

A Right. I would like to forget the whole mess.

Q I sincerely believe that, but the point is you try to remember as best you can.

A I am trying, but I cannot remember.

Q Now, what was this discussion in this message about papers?

A What do you mean?

Q As I understand your testimony to Mr. Crum was that your instructions were to call someone to order escape [95] and evasion blades and closely wound pipe.

A Closely wound pipe, and they gave me an address.

Q Was that "work closely around pipe," was that describing the blades?

A I don't know. That is just the way the message was given, and I gave it the way it was given to me.

Q Was that message given to you?

A No, it was the way my husband gave it to me. All I had was the address.

Q Was the address written?

A Yes.

Q And the phone call and the phone number?

A The phone number of the people, yes.

Q He didn't tell you who you were going to call?

A It had the name on it but I don't remember it.

Q You placed two calls to no avail?

A I made two, and one that I got ahold of her.

Q The one you got ahold of her, you made from the phone booth?

A I made two that weren't available, the third one I got her, and told her I would go to a phone booth and make the call.

Q I see. At that point, at the point you had this discussion with your husband, did you believe or have any indication to believe that your husband was involved [96] in an attempt to escape?

A No. Why should he escape when it's almost time to come home.

Q Did your husband tell you or give you an indication of why he wanted you to pass this message along?

A No.

Q Now, as best as you can, Mrs. Bailey, reviewing all the other testimony that you have given today, is there anything else that you want to change your mind on?

A No.

Q You are still going to remain certain on the dates that you have given me?

A Yes.

Q And the time?

A Yes.

Q And the circumstances?

A Yes.

Q And the only thing you told me that wasn't true was these things about Spokane, the phone calls?

A Yes.

Q Now, one other thing I would like to clear up. These phone calls you made, you made a total of four. Were they all made to the same person?

A Yes.

Q You didn't call more than one person?

[97] A No.

Q Did you talk to more than one person?

A Like I said, when somebody answered the phone I asked for the person and they weren't there and I hung up.

Q The first two calls that is what happened, they weren't there and you hung up?

A Right.

Q Did you ever have any discussion other than whoever this person is, there?

A That was it.

Q You didn't pass the message on?

A No, I did not.

Q The third time did you get ahold of the person?

A I got ahold of the person I was supposed to get ahold of and I told her I would call her back in a minute from a phone booth.

Q Did that person answer the phone or someone else answer?

A She answered.

Q You said hang on, I'll call you back from a phone booth or something like that?

A Yes.

Q So the message you passed, you talked to only one person and you talked to another person and hung up, is that right?

A Yes.

[98] Q These were all the same phone number?

A Yes.

Q You made no other phone calls to Spokane to any other number at any time?

A No.

Q And your further testimony in cross examination, you testified, and I want to clear it up, the phone call you're talking about Spokane, that phone call was not made to Josephine Powell, was it?

A No.

Q And you don't know Josephine Powell?

A No.

Q Is this the first time you have seen Josephine Powell?

A Yes.

MR. MOBERG: I believe that is all.

REDIRECT EXAMINATION

BY MR. CRUM:

Q You don't recall the name of the person that you called?

A No, I don't.

Q Now, you testified that you don't know what escape and evasion blades are.

A Right.

Q But you are not telling us are you, Mrs. Bailey, that you didn't connect that with some sort of an escape plan?

[99] A No, I swear to God I don't know what they are.

Q But did you assume it had something to do with escaping from the penitentiary?

A No.

Q You didn't even assume that?

A No.

MR. CRUM: Okay.

RECROSS EXAMINATION

BY MR. MOBERG:

Q One other question now. This is important, so I am going to try to make sure it is perfectly clear. You testified the person you called was not Josephine Powell?

A Right.

Q How did you establish that it was not Josephine Powell?

A Because it wasn't—because I can remember it wasn't her name.

Q The name that you can't remember, you are sure it wasn't Josephine Powell?

A Right.

Q But it wasn't—it might have been some other name but it wasn't Josephine Powell?

A That is right.

MR. MOBERG: That is all.

Again, I would like to keep this witness.

THE COURT: You are to remain in the witness room, [100] Mrs. Bailey.

(Witness excused.)

[TESTIMONY OF GERALD B. HICKER]

GERALD B. HICKER, called as Plaintiff's witness, being first duly sworn, testified as follows:

BY THE CLERK:

Q Will you please state your full name for the jury and the Court, spelling your last name.

A Gerald B. Hicker. (Spells)

DIRECT EXAMINATION

BY MR. CRUM:

Q Mr. Hicker, what is your address?

A Box 250, Steilacoom, Washington. I reside on McNeil Island proper.

Q What is your occupation?

A I am a Correctional Supervisor.

Q At McNeil Island Penitentiary?

A Yes.

Q How long have you been a correctional supervisor?

A I have been a correctional supervisor since 1963, but I have been employed by the Bureau of Prisons for approximately twenty-three years.

Q How much of that time have you spent at McNeil Island?

A About fifteen years—fourteen or fifteen years, two different times.

Q Just basically what are your duties as correctional [101] supervisor?

A I am the correctional supervisor assigned to investigation with the scope of duties involving major violations of regulations to any crimes against the government on McNeil Island proper, or to any inmate there.

Q You work within the institution itself?

A Yes, sir.

Q Are you acquainted with Mrs. Theresa Bailey?

A Yes, I am.

Q In fact, have you seen Mrs. Bailey in and about the courtroom this morning and this afternoon?

A Yes, I have.

Q How is it that you happen to know Theresa Bailey?

A I met Theresa Bailey in the institution's visiting room some months ago. Her husband introduced her to me.

Q Is her husband an inmate in that institution?

A Yes, sir.

Q At McNeil Island?

A Yes, sir.

Q What is his name?

A George Lynn Bailey.

Q Do you know Mr. Bailey personally?

A Yes, sir, I do.

Q And you know Mrs. Bailey personally?

[102] A Yes, sir, I do.

Q And do you know approximately how long Mr. Bailey has been an inmate at McNeil Island?

A Bailey came to McNeil Island on July the 23rd, 1972 in a transfer from the Federal Correctional Institution at Lompoc, California.

Q I believe you mentioned you met Mrs. Bailey some months ago?

A Some months ago, yes.

Q Directing your attention to the first part of March, 1973, did you on that date have occasion to meet with Theresa Bailey?

A Yes, on March the 3rd, 1973 I met with Mrs. Bailey at the parking lot at the Tacoma Mall, in reference to a package that she had received in the mail.

Q On March the 3rd you met with her?

A On March the 3rd I met with her at approximately 4:40 p.m.

Q Had you had any telephone conversations with her prior to meeting with her personally?

A Yes, I telephoned Mrs. Bailey at approximately 2:40 p.m. that afternoon from the home of the FBI Agent Byrd, asking her to meet us at the Tacoma Mall in reference to the package she had received.

Q What occasioned your phone call to Mrs. Bailey?
[103] A I was informed that she had received a package in the mail which contained firearms, ammunition and hacksaw blades.

Q How many phone calls did you have with Mrs. Bailey, or phone conversations prior to meeting with her?

A On March the 3rd I had one phone call with her, personally.

Q All right. And then you met with her again on March the 3rd?

A Yes, at 4:40 p.m.

Q Okay. And was anyone with you at that meeting?

A FBI Agent Randall Byrd.

Q Where did the meeting take place?

A In the parking lot at the Tacoma Mall on South 48th and Oak Streets.

Q Why did you happen to select, or why was this particular place selected for the meeting?

A This place was selected by FBI Agent Byrd because of its location, and that he did not feel, nor did I, that we should go directly to the home of Mrs. Bailey.

Q When you saw Mrs. Bailey on this occasion did she appear to you to be upset?

A She was extremely, visibly upset. She had a very hard time talking, sir.

Q What if anything took place during the course of this [104] meeting?

A We talked to Mrs. Bailey briefly, and FBI Agent Byrd informed her that if she received any further—

MR. MOBERG: I'm going to object to him testifying what Agent Byrd said.

THE COURT: Sustained.

Q Was there some discussion with you and Mrs. Bailey about what you had discussed on the telephone?

A None other than having her informed that she should notify us if she received any further packages or information or telephone calls relevant to the packages we already had.

Q What did this telephone conversation you had on March the 3rd relate to?

A The telephone conversation on March the 3rd related to the fact that she had received in the mail a package which contained two shotguns, one full box of 12 guage ammunition, one partial box of 21 rounds of ammunition, and 34 hacksaw blades.

Q You met with Mrs. Bailey. Did she have the package that you and she discussed?

A Yes, she did.

Q This was on March the 3rd at the Tacoma Mall?

A Yes, sir.

Q What did she do with that package?

[105] A She turned it over to Mr. Byrd in my presence. She had it in the back seat of her car and took it out and gave it to Mr. Byrd in my presence.

Q Can you physically describe the package itself?

A Yes, it was a cardboard container, light in color. It was approximately three feet long. Maybe eight or ten inches wide. Two or three inches in depth.

Q Was there any wrapping paper around it?

A I don't believe—there was no wrapping paper, sir.

Q Did you make an inquiry of Mrs. Bailey at that time relative to the presence or absence of wrapping paper?

A I made an inquiry at that time and an inquiry earlier, sir, to Mrs. Bailey as to the wrapping, and she said she had placed them in a garbage can, sir, at her home.

Q Now, showing you what has been marked for identification as Plaintiff's Exhibit No. 2, can you tell me whether or not you recognize that exhibit?

A I recognize this exhibit as the Ulysses Magnum double-barreled shotgun that was made in Spain, a very beautiful shotgun. I recognize this as a shotgun that Mr. Byrd took the serial number from.

Q How do you recognize it as being that shotgun?

A Right here, on the foremount of the barrels. It is a Ulysses Magnum made in Spain with some very fancy markings right here at the forehead of the barrel. It [106] was a very beautiful shotgun, sir.

Q Did you initial that?

A No, sir, I did not examine it any more than necessary because we wanted to maintain any fingerprints if there was a crime committed with this.

Q Did you take down the serial number off that, yourself?

A I did not, but I observed Mr. Byrd take the serial number.

Q Do you recall what it was?

A No, sir, I do not recall.

Q You do not have any particular markings on that weapon, to know what the number is?

A No, sir, I do not.

Q So you want to definitely state that is the exact, the same item you saw on March the 3rd.

A Not exactly but it is an exact replica, sir.

Q Showing you what has been marked for identification as Plaintiff's Exhibit No. 3, can you tell me whether or not you recognize that item?

A This item is exactly as the one removed from the package. It is a 12 guage single barrel shotgun and from all indications is apparently brand new. This appears to be a shotgun.

Q Did you make any marks on that or copy down the serial number?

[107] A No, sir, I did not. I observed Mr. Byrd take the numbers from the shotgun.

Q All you can say is that it appears to be similar?

A Similar, yes.

Q To the weapon Mrs. Bailey turned over to you on March the 3rd.

A Yes.

Q What other items were in that package?

A There were 34 hacksaw blades, sir, and two boxes of ammunition, shotguns shells.

Q Did you make any marks on any of the hacksaw blades or the shotgun shells?

A No, sir, I did not.

Q Would you take a look at Exhibits 4 and 5 there and tell us whether they appear to be similar to the items turned over to you on March the 3rd.

A This appears to be the full box—the reason I say that, without opening it, is that I recall it had a Fred Myers price tag on it. It was apparently a new box. This appears to be the box of 21—if you desire me to open them and check, I will, but I believe that is—

Q You wouldn't be able to tell us for certain those are in fact the same shells that came out of the package Mrs. Bailey gave you, could you?

[108] A To the best of my knowledge. However, I did not mark the package.

Q Would you take a look at the other exhibit.

A (Witness looks at Exhibit 5.)

Q Can you tell us whether or not you have ever seen that exhibit before?

A These are identical to the hacksaw blades in the package. I state this by the fact that these yellow ones here are a very fine shadow—proof blade that I commented on and I recall six blades with the K-Mart price tag still on them, and there are six blades here with the K-Mart price tag.

Q But you made no marks on them?

A No, sir, I did not.

Q But your testimony is that Exhibits 4 and 5 appear similar to the items turned over to you on March the 3rd by Mrs. Bailey?

A Yes.

Q What did you do with these items once they were turned over?

A They were taken to the home of FBI Agent Byrd, by Mr. Byrd and myself. The items were carefully looked at. However, in a manner not to remove any fingerprints. Mr. Byrd took the serial number of the two shotguns and from his private home he called his Seattle office and [109] they ran a check through the NCIC in Washington, D.C. to see if the shotguns were stolen.

Q Have you had any other occasion up until the present time to have any contact with any of these items?

A I haven't seen these items since, until today.

Q Now, after your meeting on March the 3rd with Mrs. Bailey, did you have any other occasion thereafter to again talk with Mrs. Bailey?

A Mrs. Bailey called me on the 9th day of March, 1973, and told me that she had received a telephone call and that a second package was going to or had been mailed to her.

Q Did you indicate to her at that time that you knew about this second package?

A I don't believe that I did indicate to her at that time that I knew about the second package.

Q Did you indicate to her that you had the second package?

A No, it would have been impossible to have the second package. I indicated to her that we could stop the second package.

Q But your testimony is now that at that time you had no knowledge other than this phone call of the second package?

MR. MOBERG: I object to the question as being leading.

[110] MR. CRUM: All right, I will withdraw the question.

THE COURT: I was leading.

Q (By Mr. Crum) All right. Following this telephone call, from Mrs. Bailey, did you have any other contact with her?

A Yes, on March the 13th Agent Randall Byrd of the FBI and myself proceeded to the home of Mrs. Bailey and received a second package that was unopened.

Q What prompted you to go to her home?

A She notified me that she had received the package.

Q Had you seen this package prior to that time?

A No, sir, I had not.

Q Then did you in fact, and Agent Byrd, meet with Mrs. Bailey at her home?

A Yes, sir, we did.

Q And the date was what?

A The 13th day of March, 1973.

Q Was there anyone else at the residence besides Mrs. Bailey?

A I believe a couple of her children were home. I can't swear to it, but I believe they were.

Q When you got to her residence did you observe a package?

A Yes, sir, we did.

Q Was that package opened or unopened at that time?

A That package was unopened.

[111] Q Did Mrs. Bailey do anything with respect to this package in your presence at that time?

A Yes, sir, she initialled and dated and timed the package at the direction of FBI Agent Byrd in my presence.

Q Then what did she do with the package?

A Turned it over to Mr. Byrd, the FBI agent.

Q Was it unopened at this time?

A Yes, sir, it was.

Q What did you and Mr. Byrd do with the package?

A Mr. Byrd initialled the package at that time. We took the package to the FBI office in Tacoma, Washington and we opened the package and we observed inside the package a sawed-off shotgun and two boxes of shotgun ammunition. I believe they were Peters-type ammunition.

Q Showing you what has been marked for identification as Plaintiff's Exhibit 6, can you tell me whether or not you recognize Exhibit 6?

A Yes, this is the package that bears the initialling of the package and the date, and timing, in two places by Mrs. Bailey, and in two places by FBI Agent Byrd. This was initialled in my presence.

Q Did you initial the package in the presence of the others?

A I did not initial the outside of the package, no, sir.

[112] Q Is that a package then—well, your testimony is that that is the same package?

A This is the outer wrapping of the package, yes, sir.

Q That is the package you and Agent Byrd opened in his office?

A Yes, sir.

Q You indicated when you opened that package you found the contents of that package to be what?

A One sawed-off shotgun and two boxes of shotgun ammunition.

Q Showing you, Mr. Hicker, what has been marked for identification as Plaintiff's Exhibit No. 7, can you tell us whether or not you recognize that item?

A Yes, sir, I recognize it very, very well.

Q How do you recognize it?

A Because I, on March the 13th, 1973, in the office of the FBI, wrote my name on this package. It appears right here. "G.B. Hicker" in my handwriting.

Q Is it dated?

A Yes, it is dated March 13, 1973, G.B. Hicker, and I wrote it with a metal stylus, right here.

MR. CRUM: Do you want to take a look at it?

MR. SMITH: (Nods) Yes.

(Bailiff hands the exhibit to opposing counsel.)

MR. MOBERG: I would like to inquire on voir dire, [113] Your Honor.

THE COURT: You may proceed.

MR. CRUM: I am not moving for the admission now.

MR. MOBERG: I presume the prosecutor would move for its admission.

MR. CRUM: I will if Mr. Moberg wants to go ahead and inquire, I will move now. You may inquire of the witness.

THE COURT: You may inquire.

VOIR DIRE EXAMINATION

BY MR. MOBERG:

Q Mr. Hicker, now is it your testimony that that is the weapon that appeared in the package that you picked up from Mrs. Bailey March the 13th?

A Yes, my name is on it.

Q Your name is on one part of it. Was it exactly like that at the time you saw it? Was the bolt open?

A I don't recall, the bolt could have been closed. This is the weapon I wrote my name on it, sir, on that date.

Q Was the barrel on it?

A The barrel was sawed-off that way because I noticed a poor job of sawing it off.

Q Was it two parts or one part?

A I don't believe—I believe it was one part. I don't recall offhand. This is the weapon.

[114] Q Was any other initialling on it other than your your initialling at the time you saw it?

A I believe Mr. Byrd initialled the thing at the same time I did, and I believe shortly before I did. Maybe a minute.

Q Then did you keep the gun in your possession?

A No, sir, I did not.

Q You left it with whom?

A FBI Agent Byrd.

Q From your own knowledge, except for what someone might have told you, now you didn't observe the gun transferred from Mr. Byrd's office to somewhere else?

A No, sir, I did not.

Q You left it with Mr. Byrd, and that is the last time you saw it?

A Until today, yes, sir. This is the weapon I put my name on.

MR. MOBERG: I have nothing further. I'm not sure until we establish the chain of possession that that can be admitted.

THE COURT: It hasn't been offered yet, counsel.

MR. CRUM: I will offer it. Are you objecting to the admission?

MR. MOBERG: We have got to establish how the gun got in Mr. Hicker's possession to the courtroom and that [115] it is the same gun and the same condition and all the same marking. I don't think that is established.

MR. CRUM: I think all that we need to show is that this is the weapon he received on that date.

THE COURT: Usually the matter of tracing the possession is only a means of identification that it is the same weapon, but this witness has testified he inscribed his name on the weapon. I can see no possibility that it could be other than the weapon to which he has testified.

MR. MOBERG: I take it your Honor is saying that you are overruling my objection.

THE COURT: Well, I will listen if there is further argument. If so, I had better send the jury out, I think.

MR. MOBERG: I don't believe I have any further argument.

THE COURT: I'm going to admit the exhibit.

BY MR. CRUM:

Q Now, Mr. Hicker, I am showing you what is marked for identification as Plaintiff's Exhibit 8, and I will ask you whether or not you recognize that, or those items?

A These are the two boxes of shotgun shells that were in the package that we received from Mrs. Bailey on the 13th day of March, 1973. I identify them by the date, [116] 3-13-73 in the corner of each package and the initials GBH under the date, which is my handwriting, sir.

MR. CRUM: Okay. Would you care to look at Exhibit 8?

MR. MOBERG: Yes.

(Opposing counsel look at the proposed exhibit.)

MR. CRUM: I will offer Exhibit 8, your Honor.

THE COURT: Is there any objection?

MR. MOBERG: I have a couple of questions on voir dire, if I may.

VOIR DIRE EXAMINATION

BY MR. MOBERG:

Q Mr. Hicker, there is some other writing on these boxes.

A Yes, sir, I saw that.

Q Were those writings there before or after you initialled it or could you explain those other writings?

A The initials in the lower left-hand corner on the same face as my initials that appear in the upper right-hand corner on both packages I feel very confident is the initials of FBI Agent Randall Byrd, who initialled the two packages before I did in my visual sight. In his office in the FBI in Tacoma. And the other set of—

the other set of initials on there were not on there at that time and I really don't know whose they are. I [117] can guess, but I don't know.

Q You indicated that you recognized those boxes because of the price tag?

A I recognized these boxes my name is on them, sir, my initials.

Q I thought you said you recognized it because of some price tag on them.

A I believe that was the last exhibit, not this.

Q Are there price tags on that?

A I find price tags of Fred Myers on here for \$4.47.

Q Fred Myers of Portland, is that correct?

A I don't know where Fred Myers' store was, we have stores all over the state of Washington of Fred Myers and I can't see Portland on here, sir.

Q Well, it is not there. My question was, it was your testimony in regards to identifying the Fred Myers marking on some other shells.

A I believe one of the other boxes had a Fred Myers sticker on it, yes, sir.

Q Do you recall that you noticed this Fred Myers sticker at the time you initialled the shells?

A I don't recall. I initialled these. I know these are the boxes, sir.

MR. MOBERG: I believe that is all.

THE COURT: I will overrule the objection.

[118] MR. CRUM: I will offer 8.

MR. MOBERG: We have no objection.

THE COURT: Plaintiff's Exhibit 8 for identification is admitted.

BY MR. CRUM:

Q Now, are there any other items that Mrs. Powell—or Mrs. Bailey, excuse me, turned over to you on either of these two occasions you described when you met with her?

A No.

Q Now, did you have any further contact with Mrs. Bailey after she turned this last package over to you?

A She called me in the evening of the 14th of March. I believe that was a Wednesday. She called the United States Penitentiary at McNeil Island, as she did not have my number, and they in turn called me, the control center, and I in turn called Mrs. Bailey. I believe I called her at GR 2-9797.

Q Can you be sure of that phone number?

A That phone number is GR 2-9797.

Q Have you refreshed your recollection with reference to the phone number?

A Yes, sir, I have written it down in my address book.

Q Do you have it with you?

A I have it in my pocket.

Q I wonder if we could see it?

[119] A I would prefer not to have my telephone book admitted into evidence because I have many confidential things in it.

THE COURT: You don't have to.

Q I'm just asking you whether or not that phone book reflects the telephone number, GR 2-7997.

A It does, sir, in my handwriting.

Q That is the telephone number you called to contact Mrs. Bailey?

A Yes, sir.

MR. CRUM: I wonder if you would like to look at it.

MR. MOBERG: Yes.

VOIR DIRE EXAMINATION

BY MR. MOBERG:

Q There is written in the address book Theresa Bailey, and Peterson, on the top, is that correct?

A I believe so. I would read it off of there, sir, if you desire me to.

Q And the phone number is in different color ink.

A Not the phone number in different colored ink, is not. This here is the new phone number I called on that date, GR 2-7979. I drew a line through it. This is the number I called right here.

Q When did you write this in your book?

A I haven't the faintest idea. I write names all the time [120] in here, and I don't remember. And I may get your phone number in here someday. I might need it to call you for a lawyer, I don't know.

MR. MOBERG: Okay.

BY MR. CRUM:

Q Anyway, that was the number you were using to contact Mrs. Bailey?

A Yes, sir.

Q And you reached Mrs. Bailey when you dialed that number?

A Yes, sir.

Q Now, Mr. Hicker, are you familiar with the defendant in this case, Josephine Powell?

A I have seen her on three occasions.

Q Do you recognize Mrs. Powell as being present in this courtroom?

A I recognize Mrs. Powell as being in the courtroom. However, I recognize a change in Mrs. Powell from the last time I saw her.

MR. MOBERG: I object to that, your Honor.

THE COURT: The response is proper.

BY MR. CRUM:

Q Did you finish your—

A When I last saw Mrs. Josephine Powell, on the 8th day of March, she was heavier than she is at this time. Her hair was more yellowish and more straight than it [121] is at this time.

MR. MOBERG: Your Honor, I object. I can't see the relevancy of this.

THE COURT: He is testifying to his recognition of her. I think it goes to the identification and it is proper.

BY MR. CRUM:

Q Is Mrs. Powell present in the courtroom?

A Yes, she is the woman at the end of the table. I must say she is much more attractive now than she was then.

MR. MOBERG: Your Honor, I object again.

THE COURT: Sustain the objection.

BY MR. CRUM:

Q How do you happen to know Mrs. Powell?

A I have seen Mrs. Powell in the inmate visiting room at the United States Penitentiary at McNeil Island, Washington, visiting the man she has called her husband, Travis Powell.

Q Are you acquainted with Travis Powell?

A Yes, sir, I am.

Q Is he an inmate at McNeil Island?

A He was, sir, at that time.

Q At what time?

A Up through the latter part of March, 1973.

Q He is no longer at McNeil Island?

[122] A No, sir, he is not.

Q Where is he now?

A I believe to the best of my recollection he is in the United States Penitentiary at Marion, Illinois. That could be changed, but I believe that is the way it was.

THE COURT: Was he at McNeil Island during the time you had the conversations with Mrs. Bailey at the time she turned the packages over to you?

A Yes, sir, he was.

Q Do you know of your own recollection, approximately when Mr. Powell arrived at McNeil Island?

A I don't recollect the exact date he arrived there, but I recollect that I first started talking to him off and on in January of '73. I did not have his file, but I remember definitely talking with him considerably, starting in January of '73.

Q And he remained there until approximately—

A The latter part of March, '73. Maybe the first of April.

Q Now, you testified that Mrs. Powell visited Travis Powell during this period of time?

A Yes, sir.

Q Do you recall that from your own recollection?

A No, I have the official documents that she signed to enter the United States Penitentiary at McNeil Island.

[123] Q Do you have them with you?

A Yes, I do.

Q Might we see those?

A These, sir, are the official registers for visitors to inmates at the United States Penitentiary, McNeil Island at Steilacom, Washington, dated 1-6-73; 2-1-73; and 3-8-73, Mrs. Powell's name is indicated.

MR. CRUM: I wonder, before you get into that if we could identify those by marking them as an exhibit?

(Items marked for identification by the Clerk.)

Q Now, these records that you have here, how is it that these records are kept?

A These records are maintained by day by day by the dock officer at Steilacom. We have an officer on duty at Steilacom on the federal section of the dock there, sent over to McNeil Island Penitentiary, placed in a locked area under my personal supervision as to who may or may not have access to them. I basically am the custodian of those records, yes, sir.

Q And what exactly are these records?

A These are the official registers where persons sign in to visit inmates at McNeil Island Penitentiary. One is made for each and every day of the calendar year.

Q Is it the normal practice that parties who make the visit [124] sometimes register?

A They must sign the register or they are not allowed on the confines of the Island, sir.

Q They personally sign?

A Yes, sir, in the presence of an officer.

Q You have indicated that you brought certain records along with you, is that correct, just certified records. You haven't brought the visitors logs for all of the—

A No, these are the official registers for those particular days.

Q What significance do those particular days have?

A Those are the dates that Mrs. Josephine Powell visited our institution.

MR. CRUM: I would offer the exhibits, your Honor.

(Proposed Plaintiff's Exhibits 9, 10, and 11 marked for identification.)

THE WITNESS: May I request, sir, that when all the court proceedings are over and finalized, if those may be returned to me by the court, in the future?

THE COURT: Yes.

MR. CRUM: I am sure the Court will see to it that they are.

VOIR DIRE EXAMINATION

BY MR. MOBERG:

Q Mr. Hicker, you indicated that these three are dates that [125] Mrs. Powell visited the institution?

A She may have visited prior to those dates, but those are the dates that I observed her at McNeil Island, sir.

Q In other words, those aren't the only times she visited?

A No, she may have visited other times. I have not been asked that question, sir. I was asked when I observed her, sir.

Q You didn't bring all of the records that showed visitation?

A Sir, I would need a truck to bring all the records.

Q Did you check the records, for example, for the entire month of February or the month of March?

A We checked the record for January, February and March, and these are the records for January, February and March, 1973. Then Travis Powell was removed from our institution and it was no longer necessary to go beyond that date. I did not check prior to January 6, 1973.

Q As far as your records reflect, during the months of January, February and March, these are the total times she visited?

A As far as our records reflect. These are the official sheets.

MR. CRUM: I will offer Exhibits 9, 10 and 11.

MR. MOBERG: I have no objection.

[126] THE COURT: Plaintiff's Exhibits 9, 10 and 11 are each admitted.

(Records of visitation to McNeil Island marked for identification as Plaintiff's Exhibits 9, 10 and 11, are admitted.)

* * * *

[127] MR. MOBERG: I think defendant's request that they [128] bring the records of all her visitations is submitted. I think we should request at this time, Jim, all of the records be brought into the court bearing on the dates between January 1st and January 13, 1973 visitation records.

THE COURT: He has testified that these are all of them from the period of January 6 through March.

MR. SMITH: Only as it regards Josephine Powell, we want who else visited Travis Powell.

MR. CRUM: I fail to see the relevancy of that.

MR. SMITH: I am sure you would, but we don't.

THE COURT: This is submitted. You are going to have to make an offer of proof of what you intend to prove by it.

MR. SMITH: We have no idea. We don't have access to the records, and they do. It is something we would like to see, and I frankly am puzzled over whether they would pick out those three individual records when they have access to finding out how many people visited him.

THE COURT: What difference does it make what other people visited him?

MR. SMITH: Because our contention is, judge, that this woman is innocent if there is any scheme going on.

THE COURT: No, we would be getting into something [129] she is not charged with. She is not being charged with conspiracy by scheme or device, only with mailing a weapon.

MR. SMITH: That is very true, but he is attempting to prove conspiracy. That is the basis of his case.

THE COURT: No, that hasn't come out yet.

MR. CRUM: Not the basis to show the contact between Spokane and Travis Powell, all relating back to Mrs. Powell.

MR. SMITH: Then we would move to strike all conversations that relate to the first package.

THE COURT: Well, I had that question in my mind at the beginning of this trial, as to why we were getting into it, but there wasn't any objection to it. I'm going to have to instruct the jury at the end of this case that they are only to be concerned with the charge in the indictment, that no one else is on trial, and no other crime is being charged.

MR. CRUM: We are not alleging, judge, that the first package is any other crime, is a criminal offense on this offense, mailing a shotgun and shells. That is not charged, and our position is this and I think that is what we are establishing, we introduced the first package because it does show motive and intent and common scheme, and it also shows that there is no [130] mistake or accident that this package from 1753 N. Lee arrived some place in Tacoma, Washington, and I think we are fully entitled to bring in the first package to show that.

* * * *

[137] Q My problem is this, you called her and asked her to bring some weapons that she had received. That is the first time you had talked to her?

A It was the first time I had talked to her personally, that day, yes, sir.

Q Who else talked to her that day?

A She may have received many phone calls.

Q You called her on March the 3rd, the first time you talked to her, and you asked her to bring some weapons. How did you find out that she had those weapons?

A I was informed that she had them, yes, sir.

[138] Q Who informed you?

A The foreman at the institution, sir.

Q When were you informed?

A March the 3rd, 1973.

Q You called her at what time on March the 3rd?

A In the late afternoon, I believe it was 2:40 p.m., but it—I believe it was that time.

Q And sometime earlier that day you had gotten wind that she received a package in the mail?

A About noon that day, sir.

Q Was the first time you were aware she had received some package in the mail?

A Yes.

Q Do you know of your own knowledge when she received that package?

A I have no knowledge of my own of when she received that package, other than what I have heard, sir, in the development of the case, sir.

Q What prompted you then to call her on March the 3rd, in your capacity as correctional supervisor?

A After I discussed the matter with FBI Agent Randall Byrd, this was determined by me to be the proper thing to do.

Q In other words, you found out about some package that she received and you called FBI Agent Byrd?

A I went to his home and discussed it with him personally, [139] sir.

Q He told you to call Theresa Bailey?

A To call and arrange for the meeting so that she could turn over the firearms if I was there, sir.

Q Do you recall the name of the person that gave this information to you?

A Do I recall the name of him? I know the name of them.

Q Who was that person?

A I request the Court's permission not to give that man's name, because if I do, I am in essence giving him a death warrant, sir.

Q What do you mean when you say death warrant?

A We are, at this present time, sir, investigating a stabbing at our institution in regards to a man who passed information. I believe in my opinion I would be putting him in danger. That he would be assaulted.

Q You would put him in danger of being harmed?

A Yes, sir, of his life, sir.

Q On March the 3rd was it your position there was something going on internally in the prison?

A I have to explore the possibility. That is part of my duty, sir.

Q I realize you have to explore it, and did you explore it?

A Yes, I did.

Q Was it your conclusion before you called Theresa Bailey [140] on March the 3rd that there was something going on in the prison?

A I had reason to believe there was.

Q And for that reason you called Theresa Bailey?

A I went to the home of FBI Agent Randall Byrd.

Q I realize that, but you called Theresa Bailey?

A Yes, sir.

Q You told her that you knew she had received something in the mail?

A That I told her?

Q That you knew that she had received something in the mail, without even talking to her.

A Yes, I knew she had, sir.

Q And you arranged an appointment at the Tacoma Mall?

A Yes, sir.

* * * *

[158]

[TRIAL PROCEEDINGS, NOVEMBER 28, 1973]

[TESTIMONY OF RANDALL BYRD]

RANDALL BYRD, called as plaintiff's witness, being first duly sworn, testified as follows:

BY THE CLERK:

Q Will you please state your name in full for the jury and the Court, spelling your last name.

A My name is Randall Byrd, B-y-r-d.

DIRECT EXAMINATION

BY MR. CRUM:

Q What is your occupation, Mr. Byrd?

A I am a Special Agent for the Federal Bureau of Investigation stationed at Tacoma, Washington.

Q How long have you been a special agent of the FBI?

A I am in my eighth year.

Q And you are assigned to the Tacoma office?

A Yes, sir.

Q Were you so employed in that capacity in Tacoma from January, 1973 until the present time?

A That is correct.

Q Are you acquainted with Gerald Hicker?

A Yes, sir, Lieutenant Hicker.

Q How do you happen to know Mr. Hicker?

A Mr. Hicker is my liaison officer at McNeil Island, which is my jurisdiction relating to crimes we investigate.

[159] Q Basically, what are your duties as an agent?

A Well, we are charged with investigation of those criminal acts specified by Congress under which we are delegated as the investigative agency.

Q What are your duties at McNeil Island?

A At McNeil Island, primarily as investigator of the criminal violations occurring on a federal reservation, which is generally referred to my office through Mr. Hicker or by him, in terms of any murders in the institution, any assaults, and escapes, matters such as that.

Q So, McNeil Island is a federal reservation?

A That is correct.

Q In this capacity, you work with Mr. Hicker?

A Very closely.

* * * *

[172] Q Now, did you subsequently have another occasion to meet with Mrs. Bailey following your meeting of March the 3rd, 1973?

A I certainly did, sir.

Q Do you recall the date of that meeting?

A That would be a Tuesday, March the 13th.

Q And you met personally with Mrs. Bailey on March the 13th?

A I went to her residence with Lt. Hicker, and in my business car.

Q Did you have any discussions with Mrs. Bailey at that time?

A Only that, you know, she recognized us and was expecting [173] us to be there, and nothing other than the fact that here is a package.

Q What was the purpose of your visit?

A She said she had received another package in the mail. She reported it to Mr. Hicker.

Q It was after that that you went to her residence?

A Yes, sir.

Q Was there a package at her residence?

A Yes, sir.

Q What condition was the package in at that time?

A It was a completely sealed box, paper, with brown wrapping paper.

Q It was unopened?

A Unopened, absolutely.

Q Have you ever seen this box before?

A No, sir.

Q What did you do with that box? Was it turned over to you?

A I accepted it from Mrs. Bailey. I asked her if it was her desire to turn it over to me and she said certainly, she wanted to dispose of it.

Q Was it turned over to you and—

A Yes, sir.

Q What did you do with it?

A I transported it back to my office in Tacoma.

[174] Q Was Lt. Hicker with you?

A All the time until I got back to my office.

Q What did you do with the package?

A I opened it myself.

Q Do you recall the contents of the package?

A Yes, sir.

Q What was in the package?

A A single-barreled sawed-off shotgun.

Q Was there anything else in the package?

A Some shells.

Q Agent Byrd, I am showing you what is admitted as Plaintiff's Exhibit 6. I will ask you whether or not you recognize that exhibit.

A Yes, sir, absolutely.

Q What does it appear to you to be?

A It is a box mailed to Theresa Bailey.

Q Have you ever seen that box before?

A Absolutely, yes, sir.

Q When?

A On March the 13th when I obtained it from Mrs. Theresa Bailey.

Q Is that the box you picked up from Mrs. Bailey?

A No question in my mind it is the box.

Q How are you able to identify it?

A On the left-hand corner these are my initials and the date, and I also did the same thing on the addressee [175] portion of the box, I initialled it and dated it.

Q On what date?

A March the 13th, 1973.

Q Your testimony is that is the same box you picked up from Mrs. Bailey?

A Yes, sir, that is the item.

Q Now, Agent Byrd, I am showing you Plaintiff's Exhibit 7. I will ask you whether or not you recognize that exhibit?

A Yes, sir, this is the item that was inside the box.

Q How are you able to recognize it?

A I also initialled this with my own initials and put the date on it.

Q Do your initials appear on that weapon now?

A Yes, sir. I can observe it from here.

Q Does the date also appear on there?

A Yes, sir, March the 13th, 1973.

Q Your testimony is that that is the same gun that was in the box that you opened back in your office?

A There is no doubt in my mind, sir.

Q Showing you now Plaintiff's Exhibit No. 8, I will ask you whether or not you recognize that exhibit?

A These I definitely recognize.

Q How do you recognize them?

A These were the two items that I removed from the box [176] that I got from Theresa Bailey, and I initialled the boxes, the outer portion of the container of the shot-gun shells.

Q Do your initials appear on that box?

A Yes, sir, I see my initials on this one.

Q Is it dated also?

A Yes, sir, March the 13th, 1973.

Q You are certain those are the same boxes of shot-gun shells that you—

A That is the box I initialled, sir.

Q Now, after you opened this second package, what did you do with the items contained in the package; that is; the last three exhibits that you see?

A I also locked them in the safe in the office overnight on the 13th. It was late in the afternoon and it was my only alternative.

Q Did you take any action with respect to any of these items the following day?

A Yes, sir, I contacted the postal authorities and I explained to them and exhibited to them what I had found, and Warren Olson again, the postal inspector, was advised of what I had.

Q Did you turn those items over to him?

A I released that day only the items in that box. I kept the other items.

[177] Q What other items?

A The first ones that were shown, the two guns and hacksaw blades.

Q You released the items from the first box subsequent to the time you released the items here?

A These were released the following morning, March 14th, and the others later. For which I have a receipt.

Q Do you have the date?

A The 22nd of March.

Q After you turned the items over to Inspector Olson, did you have any further contact with them?

A No, sir, I haven't seen them in the interim at all.

Q Have you had occasion to have any further contact with Mrs. Bailey?

A No, sir, not until Monday.

MR. CRUM: I believe that is all I have.

* * * *

[179] Q Mr. Byrd, you indicated that you recognized that it was a Spanish double-barreled shotgun, and you recognized also the pump shotgun, the Mossburg?

A Yes.

Q You had both of these guns in your possession, and I take it from approximately March the 3rd?

A Yes, sir.

Q Until March the 22nd?

A That is correct, sir.

Q So it would be a total of something less than three weeks, about three weeks?

A Yes, sir.

Q Twenty days, something like that?

[180] A That is proper.

Q Where did you keep those guns while they were in your possession?

A We have a stand-up safe that is a combination safe.

Q In other words, you kept them?

A In the office of the FBI.

Q All right. You kept them yourself, in your office. You didn't turn them over to some other office in your FBI department. You kept them yourself?

A That is right, sir, I did.

Q In examining both the double-barreled shotgun and also the pump gun, shotgun, I notice they have both been fired. Do you know who did that?

A I have no idea.

Q Did you fire them?

A No, sir.

Q Do your records indicate whether or not any agent on behalf of the postal authorities fired the guns?

A That would not be reflected in my report.

Q You have no knowledge of that?

A None whatsoever.

* * * *

[183] A I received one package from Mrs. Bailey on the 3rd of March, not two.

Q I understand that it has been some period of time, and it is easy to forget things, and I'm curious to know whether or not Mrs. Bailey could have received two different packages, one with guns and one perhaps shells in it, and the second package with just the hacksaw blades.

[184] A Mrs. Bailey—

Q Do you have any recollection of anything like that occurring?

A None at all, sir.

Q Your recollection is that there was a single package and all three items were in the same package?

A To the best of my recollection.

Q All right. Now, after you got this first package and you called up the postal authorities, I understand, because you thought there might have been some kind of a violation involved and discussed the contents of that package with them?

A Yes, sir.

Q Do you know when that telephone call was made?

A It wasn't by telephone. I would have contacted them just down the hall.

Q They are in your same office building I take it?

A Yes, sir.

Q So you went in and talked to them about it?

A Yes, sir, the items in No. 1.

Q And also when you took possession of the second package, you again contacted them?

A That's right.

Q And I assume you went down and saw them and discussed with Warren Olson, is that correct?

[185] A That is correct.

Q And it is a fact that Mrs. Bailey received a second package with another shotgun in it and shells?

A Yes, sir, that is correct.

Q And you discussed the problem of some possible criminal violation?

A Yes, sir.

Q You left it up to them whether there was or was not?

A Yes, sir. When I observed what was in the package and I couldn't see that it was any matter over which we had investigative jurisdiction.

Q Did you think there was any criminal violation on the second one?

A No, I am not familiar with the postal laws, sir. I didn't know.

* * * *

[188] Q Let's see, now, as I recall, Mr. Byrd, you indicated I believe when you got the second package, the sawed-off shotgun, you turned that over on the same day you received it to the postal authorities?

A I couldn't get anybody. It was too late in the afternoon, so I kept it with me.

Q What day of the week was that, do you recall?

A The 13th should have been a Tuesday. The following morning. It was a weekday as opposed to a weekend.

Q That is correct. The 13th would have been a Tuesday?

A Is it? Okay.

Q On Tuesday, when you got that, what did you do, put it in your safe?

A Immediately.

Q And the following day, the 14th, did you turn it over to the postal authorities?

A That is right.

Q Do you have any knowledge whether or not that gun was ever fired or capable of being fired?

A None. I am not a firearms expert in that respect, so whether it was fired before I had or after, I can't tell you.

Q Can you tell from your inspection whether or not that gun had been fired?

A No, sir, I really couldn't. I had no way of conducting [189] the necessary examination.

Q What in your educational courses, say, that you took when you joined the FBI, what sort of firearm instructions did you get, mainly pistols, revolvers, stuff like that?

A Yes, hand use of a shotgun and rifle.

Q Did they give you any courses in breaking the guns down and cleaning them and handling them?

A Yes, sir, that is true.

Q Do you recognize whether or not a gun had been fired?

A No, sir, I couldn't. I could take out my own revolver and I couldn't tell you when it was fired last.

Q Well, for instance, shotguns. Based on your own experience with shotguns and things of that nature, can you tell whether or not you would know whether such a gun had been fired, or any other gun?

A To speak absolutely and positively, no, I would surmise or guess but as far as being an expert in that respect, no, I couldn't tell you.

Q Do you engage in cleaning weapons after you use them?

A Yes, sir, absolutely.

Q Have you examined the barrels after they have been shot?

A Certainly.

Q Have you examined the barrel of this gun, for instance?

A No, sir.

[190] Q Handing you this barrel now, can you tell whether or not you think that gun has been fired? I want you to closely look at the striations that go down that barrel, on the inside, you put it up to the light and look through it.

A Well, if I were to make a determination on my limited knowledge, I would look to see if there was any powder in this area, not necessarily from around the edge of the barrel because it's dirty, it has not been cleaned, but this gun had not been fired recently.

Q Look at it from the other end.

A This end?

Q Yes.

A Yes, it's a dirty barrel.

Q Looking down that, do you see any striations or lines down that barrel?

A Looking down that barrel I do see something that looks like—nope, maybe I'm not trying it right.

Q Do you see the straight lines? They go right straight down this barrel—are you familiar with how these guns are made?

A No, sir, I don't see any striations.

MR. SMITH: That is all.

* * * *

[194]

[TESTIMONY OF WARREN MORTON OLSEN]

* * * *

Q Where are you employed?

A Tacoma, Washington.

Q What is your occupation?

A U.S. Postal Inspector.

Q How long have you been a postal inspector?

A Since August, 1969.

Q How long have you been stationed at Tacoma, Washington?

A Since October, 1969.

Q What are your duties basically as a postal inspector?

A To investigate violations of the federal postal statutes.

Q So you are an investigator?

A Yes, sir.

Q Inspector Olsen, I am showing you Plaintiff's Exhibit No. 2. Can you tell the Court and the jury whether or not you recognize that exhibit?

A Yes, sir.

Q How do you recognize it?

[195] A Well, this is a Spanish made, double-barreled, 12 gauge shotgun.

Q Is that Exhibit 2 or 3 that you are looking at?

A No. 3 is the pump Mossburg. Exhibit 2 is the Spanish double-barreled.

Q How do you recognize that item?

A In March of 1972 I saw this in the possession of the FBI, and we discussed it. There was a Spanish, or a Spanish made, double-barreled 12 gauge, and a Mossburg pump, which had possibly been mailed to Tacoma from Spokane, Washington.

Q I believe you said March of '72.

A '73.

Q You saw it in the possession of the FBI?

A Yes, sir.

Q I wonder if I could ask you to speak up.

A Yes, sir.

Q How do you mean, by the FBI?

A Special Agent Randy Byrd of Tacoma, Washington.

Q He had that exhibit in his possession?

A Yes, sir.

Q Did you subsequently acquire possession of it?

A On March the 22nd, 1973, I received this from Special Agent Byrd. I gave him a receipt for it. I

registered and mailed it to Inspector Hootz at Spokane [196] on that date.

Q Can you be positive that that is the same item that you received from Agent Byrd and mailed to Inspector Hootz?

A To the best of my knowledge this is.

Q You did not mark that item, did you?

A No, sir, I did not.

Q So you can't be positive that that is the exact same item?

A No, sir.

Q Does it appear similar to the item you received from Agent Byrd?

A Yes, it does.

Q Would you please take a look at the other exhibit, No. 3, and I will ask you whether or not you recognize that exhibit?

A To the best of my knowledge, this is the same Mossburg 12 gauge pump that I received from Agent Byrd.

Q Did you receive both exhibits from Agent Byrd at the same time?

A Yes, sir.

Q Again, what was that date?

A March the 22nd, 1973.

Q Do you know whether or not that is the same gun you received from Agent Byrd?

[197] A I did not mark it so positively I cannot say.

Q Does it appear similar to the one you received?

A Yes, sir.

Q You mailed that gun to Postal Inspector Hootz?

A On March the 22nd.

Q The same date you mailed the other one?

A Yes.

Q Have you had any contact with those exhibits since you mailed them to Inspector Hootz?

A Yes, sir, I have.

Q What contact would that be?

A I just saw them laying in a room one day.

Q Where did you see them laying in a room?

A In your office.

Q At the time you took possession of those two firearms from Agent Byrd, did he turn over any other items to you?

A Yes, sir, there were two boxes of 12 gauge shotgun shells and some hacksaw blades.

Q Showing you what has been marked for identification as Plaintiff's Exhibit 4 and Plaintiff's Exhibit 5, I will ask you whether or not you recognize either of those exhibits?

A These appear similar to some I received from Mr. Byrd.

Q Did you make any marks on either one of those exhibits?

[198] A No, sir.

Q So you are not positive that the shells there in Exhibit 4 and the hacksaw blades in Exhibit 5 are the same ones you received?

A No.

Q But they do appear similar?

A Yes, sir.

Q All right. What did you do with those items?

A These were all mailed in the same pouch and mailed to Inspector Hootz.

Q On the same day you received them from Agent Byrd?

A Yes, sir.

Q Showing you Plaintiff's Exhibit No. 6, Inspector Olsen, I will ask you whether or not you recognize that exhibit?

A Yes, sir, I received this from Special Agent Byrd on March the 14th, 1973. I initialled it on that day.

Q Your initials appear on that package?

A Yes.

Q Where do they appear?

A On top of the label of the addressee and partly on the parcel.

Q Is the date that you received the package on there?

A It is.

Q And it was received by whom?

A From Special Agent Randy Byrd, of the FBI.
[199] Q What did you do with the package?

A I placed this in my evidence locker. I locked it up. I notified my division headquarters there was a probable mailing violation and I said to wait for further instructions, to keep it under my control.

Q Did you keep it under your control?

A Yes, sir.

Q Until what time?

A March the 22nd, 1973.

Q What did you do with it on that date?

A I mailed it to Inspector Hootz in Spokane.

Q That was the same day you mailed the other exhibit you testified to?

A Yes, sir.

Q Showing you now Plaintiff's Exhibit No. 7, Inspector Olsen, I will ask you whether or not you recognize that exhibit?

A Yes, sir, I received this from Mr. Byrd on March the 14th, 1973. I initialled it and dated it on that date.

Q Do your initials appear on that?

A Yes, sir.

Q Did you receive that at the same time you received the package?

A Yes, sir, I did.

Q What did you do with that after you received it?
[200] A I immediately put it in my evidence locker with the package and notified our division headquarters.

Q You took the same procedure with that as you did with the package?

A Exactly the same.

Q And mailed it to Inspector Hootz?

A Yes, sir.

Q And the same time you mailed the other items?

A On March the 22nd.

* * * *

[205] Q What would be the function or role of the special investigator?

A He assists the other inspector in investigation of external mail thefts.

Q Theft?

A Theft of mail from mailboxes and collection boxes.

Q Then is your job and the other inspector's job to take care of postal violations?

A Yes, sir.

Q Now, you said you had contacted somebody after receiving this sawed-off shotgun, with the thought in mind that there might be a postal violation, is that correct?

[206] A Yes, sir.

Q Who did you contact?

A Our division headquarters in Seattle.

Q Did you contact them by letter, or how did you make the contact?

A I contacted them by phone.

Q You called them up?

A The initial contact was by phone.

Q I see. Did somebody from the Seattle office come down and investigate?

A No, sir.

Q You merely turned in a report?

A After that I sent a memo in.

Q A written memo?

A A written memo.

Q Who did you send that to?

A Postal Inspector in Charge, Seattle, Washington.

Q Did you get some response from them?

A They said to keep it under my control, they would probably issue the case to Inspector Hootz at Spokane, at the place of mailing.

Q They indicated they were going to contact Inspector Hootz?

A Yes, sir.

Q Who makes the determination, the postal inspectors as [207] to whether or not you think there was or wasn't a violation?

MR. CRUM: Your Honor, I'm going to object. I think we're getting far afield.

THE COURT: I will sustain the objection.

MR. MOBERG: I think that is all.

* * * *

[211]

[TESTIMONY OF GURLEY C. HOOTS]

* * * *

GURLEY C. HOOTS, called as plaintiff's witness, being duly sworn, testified as follows:

BY THE CLERK:

Q Would you state your full name for the jury and the Court, please, spelling your last name.

A Gurley C. Hoots, H-o-o-t-s.

DIRECT EXAMINATION

BY MR. CRUM:

Q I will ask you to speak loudly so that everybody can hear you. What is your occupation, Mr. Hoots?

A I am a Postal Inspector.

Q Where are you assigned?

A In Spokane.

* * * *

[229] Q What day did you go to 1753 N. Lee?

A April 16th, 1973.

Q Was there anyone else with you?

A Inspector D. N. Hayden was with me.

Q Did you in fact go to the door of 1573 N. Lee?

A Yes.

Q Did you knock on the door?

A Yes.

Q Was the knock answered?

A Yes.

Q By whom?

A Mrs. Powell.

Q Do you recognize the woman who answered the door on April the 16th at 1753 N. Lee as being the woman sitting here?

A I do.

Q Did you enter the house?

A Yes.

Q Was there anyone else in the home besides her?

A Not that I saw.

Q Did you have any other contact with Mrs. Powell after March the 16th, 1973?

A Yes, I participated in her arrest in August of 1973.

Q Did that take place in her home?

A Yes.

[230] Q Did you have occasion to have any other personal contact with her after that time?

A On November the 7th I took handwriting exemplars from Mrs. Powell, which were ordered by the—

Q When did you take those?

A November 7.

Q Where were they taken?

A In my office, in the Post Office Building.

Q Showing you what is marked for identification as Plaintiff's Exhibit 12, Inspector Hoots, I will ask you whether or not you can identify the items contained in that Manila envelope?

A Yes, I can identify all of these items.

Q What are they?

A They are exemplars of handwriting that I obtained from Mrs. Powell on November 7th.

Q Now, do you recognize them?

A I initialled or signed each slip of paper.

Q Those are handwriting samples that were given by Mrs. Powell in your presence?

A Yes, sir.

Q You in fact observed her write out those exhibits?

A Yes, I did.

MR. CRUM: I move the admission of Exhibit 12, your Honor.

[231] MR. MOBERG: I would like to examine those, if I may?

MR. CRUM: Surely.

MR. MOBERG: We have no objection, your Honor.

THE COURT: Plaintiff's 12 is admitted.

(Handwriting exemplars, marked for identification as Plaintiff's Exhibit 12, admitted in evidence.)

BY MR. CRUM:

Q Now, Inspector Hoots, you testified that you personally observed Josephine Powell fill out these handwriting exemplars, is that correct?

A Yes.

Q Could you describe for us the manner in which—

MR. MOBERG: Your Honor, I'm going to object to that. I think we are getting into an area of establishing a conspiracy.

THE COURT: I can't tell yet.

MR. CRUM: I was going to ask him to recount for us his observation of the defendant filling out these exemplars.

THE COURT: He may answer.

Q Go ahead and describe the manner in which Mrs. Powell filled out these handwriting samples.

A It was very slow and deliberate writing.

MR. MOBERG: His observations and the manner, I [232] think we are getting into a problem. He can testify as to his personal observation, but I think the manner is objectionable.

THE COURT: He can tell what he saw at the time. He may proceed.

A Slow and deliberate writing.

Q What time did you start taking these handwriting samples from Mrs. Powell?

A I think it was around 11:15 a.m.

Q Was there anyone else present besides you and Mrs. Powell?

A Her attorney was present from the beginning.

Q And what time did you finish taking the handwriting samples?

A At 2:17 p.m.

Q Have you ever, prior to this time, observed Mrs. Powell writing anything? I don't want you to tell us what it was she was writing, but have you observed her prior to this time writing anything?

A Yes.

Q And was there a difference in what you observed on the occasion when she furnished you the handwriting exemplars and on the previous occasion?

MR. MOBERG: Your Honor, I'm going to object to this as the opinion of the witness.

[233] THE COURT: He is only answering what was asked, when he observed. You may answer.

A The other writing that you referred to was not slow and deliberate, in the same manner that the exemplars were given.

Q What did you do then with the handwriting exemplars after you received them from Mrs. Powell?

A I sent them to the crime laboratory at San Francisco.

MR. CRUM: I believe that is all I have.

* * * *

[264]

[TESTIMONY OF ANTHONY EARL MABBUTT]

* * * *

ANTHONY EARL MABBUTT, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

BY THE CLERK:

Q Would you please state your full name to the jury and to the Court, please, spelling your last name.

A Anthony Earl Mabbutt, M-a-b-b-u-t-t.

[265] DIRECT EXAMINATION

BY MR. CRUM:

Q Mr. Mabbutt, we are going to ask you to speak up, as we have all of the other witnesses, because this is a big room. When you answer questions, if you will speak to the jury rather than over this way, I think it would help. What is your address?

A 2222 17th West Olympic.

Q Are you married, sir?

A Yes, I am.

Q Do you have any children?

A No.

Q What is your occupation?

A I am the Sporting Goods Manager for General Store.

Q Where is the General Store located?

A Here in Spokane, 2424 N. Division.

Q How long have you been located at the General Store?

A Two and a half years.

Q Were you employed then in the latter part of February, 1973?

A Yes, I was.

Q Were you in fact on duty on February the 21st, 1973?

A Yes, I was.

Q Generally, what are your duties at the General Store?

A I order all the sporting goods equipment and also sell [266] firearms and fishing tackle.

Q Did you have occasion on February 21, 1973, to be involved in a transaction relative to a shotgun?

A Yes, I did.

Q Specifically a 12 gauge shotgun, Serial Number GO-77180.

A Yes, I did.

Q Mr. Mabbutt, I am showing you what is Plaintiff's Exhibit 3, and I will ask you whether or not you can identify that exhibit?

A Yes, I do.

Q How do you identify it?

A By the serial number.

Q The serial number is the same one we just mentioned here?

A Yes.

Q Now, what specifically did you do with that firearm on February 21, 1973?

A I told it to a—

Q You did sell it?

A I did sell it.

Q Did you make any kind of a record of that sale?

A Yes, I did.

Q Do you have that record with you?

A Yes, I do.

Q Mr. Mabbutt, I am showing you what is marked for [267] identification as Plaintiff's Exhibit 14, is that the record of the transaction you made with respect to that firearm on February 21, 1973?

A Yes, it is.

Q Is that document signed by you?

A Yes, it is.

Q What does it reflect?

A It reflects that on the 21st of February I sold a shotgun to a Mrs. Josephine Marie Powell.

Q Is an address for Mrs. Powell given?

A Yes, N. 1753 Lee Street, Spokane, Washington.

Q The serial number of that weapon is on the transaction?

A Yes, it is.

Q Is it the same serial number as the exhibit you have in front of you there?

A Yes, it is.

Q What identification, if any, did you take from the party you sold that to?

A A Washington driver's license, plus social security.

Q All right. There is other pieces of information on that paper besides what you testified to?

A Yes, height and weight.

Q Do you recall the woman that you sold that firearm to on February 21, 1973, as being in the courtroom at this time?

[268] A Yes, I do.

Q Would you point her out?

A She is the woman sitting there at the table.

Q This is the same woman you sold the gun to on February 21, 1973?

A Yes, it is.

Q Is her appearance the same as it was on that day?

A Her appearance is that she has lost weight, her hair is a different color, and at that time she was not wearing glasses.

Q You are positive that that is the same woman?

A Yes, I am.

MR. CRUM: I will offer this, Plaintiff's Exhibit 14, into evidence, your Honor.

MR. SMITH: No objection.

THE COURT: Plaintiff's Exhibit 14 is admitted.

(Sales slip, marked for identification as Plaintiff's Exhibit 14, admitted in evidence.)

* * * *

[280]

[TESTIMONY OF SUSAN LEE McDANIELS]

SUSAN LEE McDANIELS, called as plaintiff's witness, being first duly sworn, testified as follows,

BY THE CLERK:

Q Would you please state your full name for the jury and the Court.

A Susan Lee McDaniels.

THE COURT: Mrs. McDaniels, you have a soft voice and the jurors clear over on the end have to hear you, so do your best to speak over to them.

DIRECT EXAMINATION

BY MR. CRUM:

Q Mrs. McDaniels, you are married, are you not?

A Yes.

Q What is your address?

A 5827 N. Lindeke.

Q And you have a child I understand, five days old?

A Yes, we do. Six days old.

Q He forgot so soon. Mrs. McDaniels, directing your attention that exhibit, which is a shotgun, broken down, in front of you, can you tell us whether or not you have ever seen that before?

A Yes, I have.

Q When did you see it?

A February of 1973.

Q And did you have occasion to sell that shotgun?

[281] A Yes, we did.

Q Do you remember the date?

A We ran an ad on February 21 of 1972 and we sold it the first day the ad was run.

Q Do you recall who you sold the gun to?

A No.

Q Was it a man or a woman?

A It was a woman.

Q Was there anyone besides a woman?

A No, there wasn't.

Q Could you physically describe the woman you sold the gun to, if you can?

A She had light brown hair, about 145 or 150 in pounds, and in her late thirties or early forties, and all I can say is she was taller than I was.

Q Do you recognize that person being present in the courtroom, the one you sold the gun to?

A No, I can't.

Q I'm going to ask you to take a look at the defendant in this case, Mrs. Josephine Powell.

MR. SMITH: You already did.

MR. CRUM: Well, a closer look.

Q You cannot tell us here this lady is positively the one you sold the shotgun to on February 21st?

A Well, the lady had lighter colored hair than that. She [282] weighed more than that and she didn't wear glasses.

Q Can you say this is not the woman?

A I can't say whether it is or whether it is not.

MR. CRUM: I will move for the admission of this exhibit now, your Honor.

THE COURT: Plaintiff's Exhibit 15 will be admitted in evidence.

(Shotgun, marked for identification Plaintiff's Exhibit 15, admitted in evidence.)

Q How much did you sell the gun for?

A \$86.00 I think it was.

Q Did you get the name of the party you sold the gun to?

A No, I didn't.

Q Did you get paid in check or cash?

A Cash.

Q Did you give a receipt?

A Yes.

Q But you got no information from the person you sold it to?

A No.

Q To the best of you knowledge you have had no further contact with that individual?

A No, I haven't.

MR. CRUM: You may inquire.

* * * *

[324]

[TRIAL PROCEEDINGS, NOVEMBER 29, 1973]

[TESTIMONY OF WILFRED M. SEBO]

* * * *

WILFRED M. SEBO, called as plaintiff's witness, being duly sworn, testified as follows:

BY THE CLERK:

Q Will you please state your full name for the jury and the Court, spelling your last name.

A Wilfred M. Sebo, S-e-b-o.

DIRECT EXAMINATION

BY MR. CRUM:

Q Mr. Sebo, what is your occupation, sir?

A I am Security Supervisor for Pacific Northwest Bell Telephone Company.

Q How long have you been employed by Pacific Northwest Bell in that capacity?

A Since '61.

Q Prior to that time what type of work did you follow?

A General telephone work.

Q Basically, what your duties with Pacific Northwest Bell?

A I handle damage claims, either way, against the company, and I am also designated to handle anything that would [325] have a confidential nature to law enforcement.

Q I see. Did you have occasion to check the files of Pacific Northwest Bell here in Spokane relative to telephone number 534-7185, or KE 4-7185, the same number?

A I would have to refer to my file here but I think I did. Yes, I did.

Q Specifically for the month of March, 1973.

A Yes, I did.

Q Were you able to obtain the records pertaining to phone calls made from that number during that period of March, 1973?

A I was.

Q When did you obtain those records?

A On August 7.

Q And did you personally obtain the records?

A I did.

Q Where did you get them?

A From our commercial department.

Q What type of records are these that you refer to?

A These are the long distance records of this particular telephone number.

Q Are these records kept during the normal course of business with Pacific Northwest Bell?

A They are.

* * * *

[328] BY MR. CRUM:

Q Mr. Sebo, directing your attention to the March—is there a date of March 9th, 1973 listed on that record that you have?

A Yes, there is.

Q And more specifically, does that record reflect that a telephone call was made from Telephone Number 534-7185 to a number in Tacoma on March 9th, 1973?

A There is a call to Tacoma on March the 9th.

Q And to what number in Tacoma is that call made?

A Area 206, 472-9797.

MR. CRUM: I believe that ties into the relevancy, your Honor, and I move again for the admission.

MR. MOBERG: I am not clear. I am trying to recall [329] back whether we established whose phone number was on the other end of this call.

THE COURT: I think that is in the record.

MR. MOBERG: May I see the exhibit a minute?

(Counsel looks at exhibit.)

MR. MOBERG: The phone number that you testified that the call was made from, to what address?

MR. CRUM: Well, I am going to get into that, your Honor.

THE COURT: All we are on now is the admission of the exhibit.

MR. MOBERG: Then recite to me the phone call in Tacoma that you just recited to Mr. Crum.

THE WITNESS: I'm sorry, I don't quite understand you.

MR. MOBERG: The Tacoma number the call was made to.

THE WITNESS: 206-472-9797.

MR. MOBERG: And you, of your now knowledge, don't know whose phone that is?

THE WITNESS: No, I don't know who it is.

MR. MOBERG: My only objection at this time, your Honor, is that the phone number alone doesn't tie into the residence.

THE COURT: Plaintiffs' Exhibit 17 will be admitted.

[330] (Telephone document marked for identification as Plaintiff's Exhibit 17, admitted into evidence.)

BY MR. CRUM:

Q Now, Mr. Sebo, does your record there indicate who that phone is registered to at that phone number, 534-7185?

A The subscriber that was paying the bill is Hardy Powell.

Q Does it give an address?

A N. 10005 Whitworth Drive, Spokane, Washington, 99218.

Q What you are saying, any bills charged to 534-7185 would be sent to Hardy Powell's address?

A That is correct.

Q What is the prefix, 534?

A Keystone 4 in Spokane.

Q Directing your attention to the address of 1753 N. Lee in Spokane, what prefix would be used for that area of town?

A That is Keystone, 534.

Q What prefix would be used for N. 10005 Whitworth Drive?

A That would be Hudson.

Q So your testimony that—let me ask you the question, even though the bill may be sent to Mr. Hardy Powell, that does not necessarily mean the phone would be at that address on Whithworth Drive, does it?

A There is no indication it was on Whitworth Drive.

* * * *

[335]

[TESTIMONY OF GLENN K. CARPENTER]

* * * *

GLENN K. CARPENTER, called as plaintiff's witness, being first duly sworn, testified as follows:

BY THE CLERK:

Q Will you please state your full name for the jury and the Court, spelling your last name.

A Glenn K. Carpenter, (spelling).

[336] DIRECT EXAMINATION

BY MR. CRUM:

Q What is your occupation, Mr. Carpenter?

A I am a Special Agent with the Bureau of Alcohol, Tobacco and Firearms in Spokane.

Q How long have you been in Spokane with that bureau?

A Since June.

Q How long have you been with the Alcohol, Tobacco and Firearms Bureau?

A Not quite nine years.

Q Prior to that time what type of work did you do?

A I have been with the government since 1959, and I have been with the United States Border Patrol and the Federal Narcotics.

Q What type of work did you do in that?

A I was an investigator.

Q Basically that is what you are now?

A Yes.

Q What are the basic duties you have now?

A Here in Spokane I am Resident Agent in Charge of the office and we investigate primarily firearms and explosive violations.

Q Now, I am directing your attention to the exhibit that appears before you, I believe that is No. 7, and I will ask you whether or not you recognize that exhibit.

[337] A Yes.

Q How do you recognize it?

A I have my initials scratched on the butt.

Q What do you recognize it to be?

A A sawed-off shotgun.

Q When have you previously seen that exhibit?

A I first saw it in your office a week ago today, the 22nd of this month.

Q Had you seen it prior to that time?

A No.

Q Did you perform any tests on that weapon?

A Yes, I did. I test fired the gun in your office.

Q How did you do that test?

A I used the brass base from a shotgun shell from which the powder and shot had been removed. It just had a primer in it. Inserted the primer, pulled the trigger, and it discharged the primer.

Q Did you notice any defects in the weapon at all?

A No, it appeared to function quite well.

Q You indicated you have been an investigator for quite a number of years, and you have been involved in the investigation of firearms violations, is that correct?

A Yes, that is correct.

Q Have you had occasion to investigate cases concerning concealed weapons?

[338] A Yes.

Q Have you seen the various manners and ways in which weapons have been concealed?

A Yes, I have.

Q Have you specifically had investigations concerning sawed-off shotguns?

A Yes.

Q I wonder if you could demonstrate to the Court and the jury the manner in which that particular weapon could possibly be concealed?

MR. SMITH: May it please the Court, I object to the question. He hasn't qualified the man as an expert in this field. Second, the man is getting into a question involving the jury's duties as a fact finder.

THE COURT: I think he can proceed. The jury will have to make the ultimate finding on this.

Q Would you step down and demonstrate?

A Normally, weapons of this type, you can place a strap here, put it over your shoulder and hang it under your coat. This is the procedure I have seen most used in South Los Angeles. The other would be to slip it down inside your trousers, such as this, and cover it with your coat. It's easier to conceal with an outer garment such as an overcoat than just a jacket, but those are two methods to conceal a short weapon.

[339] Q Any methods you are familiar with?

A Inside the trousers and under the jacket would be the only two for a weapon as large as this.

Q Did you have occasion to measure the weapon in my office?

A Yes, I did.

Q What are those measurements?

A The barrel is ten inches long and the overall length is twenty-two and one-eighth inches.

MR. CRUM: That is all I have.

CROSS EXAMINATION

BY MR. SMITH:

Q Mr. Carpenter, did you take some other measurements of that gun?

A No, I did not.

Q Did you measure its width?

A No.

Q Did you measure its height?

A No, no other measurements than the ones I mentioned.

Q And the length was just under two feet, was it?

A Yes. Twenty-two and one-eighth inches overall in length.

Q Okay. And you made a second measurement did you say? What was it?

A The barrel length, ten inches.

Q The barrel length. All right. Now, you got up and [340] demonstrated two possible methods by which you thought such a gun might be concealed, correct?

A Yes.

Q In both instances they left large bulges, did they not?

A I wasn't in a position to tell.

Q They would, would they not?

A They would leave a bulge, yes.

Q Normally your work, you are talking about concealed weapons, you're talking about revolvers, pistols, midnight specials, things of that nature?

A No.

Q What are you normally talking about?

A Any weapon that is possible to conceal on the person, any weapon.

Q There could be all kinds of schemes and devices I suppose that an ingenious person could develop to conceal most any type of gun, isn't that true?

A I might assume so, yes.

THE COURT: Mr. Carpenter, would you address your answers to the jurors to the far end. They have to hear your responses.

MR. CRUM: What was your answer?

THE WITNESS: I assume there might be other methods of concealment, yes.

[341] Q (By Mr. Smith) For instance, somebody could put on a very long coat and conceal a full-length shotgun by the same method that you seemed to conceal this gun, isn't that true?

A They could, yes.

Q Okay, when you were test firing this, it is true, is it not, that you did not fire any shot through the barrel?

A That is true.

Q And in fact used a shell that had powder in it only?

A No, just the primer. I used the brass base of a shotgun shell containing the primer.

Q Now, a shotgun shell—(counsel uses blackboard). Now, a shotgun shell normally, to be used, the shells are always the same size, isn't that correct? For a 12 guage shot?

A No, they have two and three-quarters and three inch shells.

Q Well, essentially, they are the same size in diameter?

A In diameter, yes.

Q The construction of a shell, it has a brass base on the end, it extends down the shell and ends, like so, and in front of that it has either plastic casing or a paper casing, is that right?

A Yes.

[342] Q Looking at the inside construction of the shell, in front of the shell you would have the crimp?

A Uh-huh.

Q That is the method by which the plastic or the paper is rolled over to keep the shot inside, isn't that right?

A Yes.

Q Then inside here you would have the little pellets, right, and the case of buckshot you would have five pellets, right?

A Depends on the size of the shot, of course. It varies. It could be a slug.

Q Or a slug. Okay. It depends. You can have all kinds of combinations up here, right?

A Right.

Q All the way, say from what they call a Size 9 shot, which would be the very smallest normally marketed, all the way down to, say, a Size 2, that is the smallest, is it not?

A Double-00 buckshot. The smallest.

Q That is the largest from shot size, and from there you get into BB's, and from there to buckshot?

A To my knowledge, yes. I'm not an expert on ammunition.

Q But anyway this is the construction up here of what you have, and you have all kinds of combinations a person could purchase in the way of loads, is that right?

[343] A That's right.

Q Are you a hunter, Mr. Carpenter?

A I haven't hunted for years.

Q Did you used to?

A Yes.

Q So you have some familiarity with the size of the shot, do you not?

A Yes, I do.

Q Isn't it true that if somebody is going to hunt birds, for instance, the normal size shot they would buy would range somewhere between four and seven and a half?

A To my knowledge, yes.

Q If they were going to shoot quail or something, they might buy seven and a half, eight, or nine, and if they were going to shoot ducks with a few more feathers, they would buy a Size 4, is that correct?

A To my knowledge, yes.

Q Have you examined these boxes of shells?

A No, I have not.

Q You didn't see them that day up in his office, Mr. Crum's office?

A Not to my knowledge. If they were there, I didn't see them.

THE COURT: Counsel, I trust you are going to tie this into something relevant. So far it doesn't sound [344] very relevant.

Q These shells—Allen, would you hand that box of shells up to Mr. Carpenter, please. Would you look at the box there, Mr. Carpenter.

A Which end, sir?

Q The end that tells the size of the shot.

A Yes.

Q Have you observed that?

A No, I have never—

Q Well, you are observing it right now. That is what I meant.

A Yes.

Q That is a Size 4 shot, is it not?

A Yes.

Q And that would be perhaps considered a normal duck load for ducks and birds?

A I have never hunted ducks.

Q Let's get back to the shell. You have the shot, and then in here you have the powder load, right?

A Usually in the brass base, yes.

Q Okay. And down here, located directly in the center, you have another little brass inset, and this is called the primer?

A Yes.

Q And when the gun is fired, the pin of the gun is setting [345] back in this position, like so, and it moves forward into the primer, and the primer is what ignites, and the primer in turn causes the powder to ignite, and when the powder ignites, it burns, forms a gas, and pushes the shell or the shot, rather, out the shell, out of the casing and on down the barrel of the gun, is that correct?

A Correct.

Q Those are the simple basics of how a shotgun shell operates, correct?

A Yes.

Q Now, in this instance, in this test firing that you did, you removed all of the shot and you removed all of the powder, right?

A Right.

Q So the only thing left was the primer?

A Correct.

Q So when we get down to what you did in this instance, you have no idea, do you, other than from this one example, or this one test that you performed with the primer, what reaction that gun might or might not have with the shot and the powder?

A I have a very strong assumption the barrel was unobstructed and if the firing pin ignited the primer, it naturally follows that a full load would be spilled [346] through the end of the gun.

Q Have you ever had any experience firing a gun like that?

A With a full load, yes.

Q With a gun like that?

A Yes.

Q Where not only the barrel is removed, but the stock, as well?

A Right.

Q It can't be put to the shoulder?

A No,—well—I wouldn't do it.

Q In fact, in order to fire that gun you would have to hold it out like this, isn't that right?

A No, I might brace it against my side.

Q Or against your hip, and fire it like this?

A Or inside the arm, there are several methods.

Q And it would have a real jolt, would it not?

A Yes, they kick somewhat.

Q It's a far greater kick than you would expect with a regular shotgun?

A I think the recoil depends on the weight of the weapon and the powder load. The recoil wouldn't be any greater, just a little harder to control.

Q That is a fairly heavy weapon, a lot of weight?

A Yes.

Q It has a bolt action in it?

[347] A It absorbs the recoil.

Q It's got a lot of metal, isn't that true?

A Yes.

Q We don't have other guns here to compare it with. We are only looking at this one, but as guns go, this is a bulky, heavy gun, isn't that true?

A It's self-evident, I guess. Depends on what you are comparing it with.

Q Self-evident perhaps to you, Mr. Carpenter, because you are familiar with all kinds of guns, but we're just talking about this one gun because we don't have other guns here. The fact is, this is a very heavy, bulky gun.

A Sir, you say you are comparing it with other guns, and I have no other gun.

Q No, we do not have.

A You went on to say in comparison with other guns it was a bulky gun. I don't understand your question, sir.

Q The question is this, Mr. Carpenter. You came to court as an expert on firearms, is that right?

A No, that is not right.

Q You are not an expert?

A I haven't been called as an expert in this court.

Q Your only expertise that you can qualify on is how to conceal guns?

[348] A I have a working knowledge of this type of weapon.

Q But you don't hold yourself out as an expert?

A I don't think it's up to me to decide my expertise. It is up to the Court.

Q Well, what do you think of yourself? Do you consider yourself an expert?

A I have seen a number of these guns in the course of my nine years experience.

Q Getting back to the original question, this is a large, heavy, bulky gun, correct?

THE COURT: Counsel, I think you're getting into an argument with the witness. The gun is an exhibit before the jury. He has explained all he can explain about it.

MR. SMITH: Well, I wanted to get into one other type, if I may.

THE COURT: All right.

Q (By Mr. Smith) That is true, is it not?

A It is a matter of opinion.

Q Okay. But because of the size of this particular gun, it makes it difficult to conceal, doesn't it?

A No, it does not.

Q It does not?

A I could readily conceal this weapon.

Q Mr. Carpenter, is there any question in your mind that [349] this is or is not, say, a weapon that is concealable?

A No, there is no question in my mind but what that is a concealable weapon.

Q No question whatever?

A No question.

Q Concealable on who?

A A person of my stature, certainly.

Q On a big person?

A I am five foot eleven and weigh 180 pounds.

Q The smaller the person, the more difficult a big gun like that becomes to conceal, is that what you are saying, because you are big?

A I don't consider myself big. I consider myself an average man and could easily conceal this weapon. That is all I am saying.

MR. CRUM: Your Honor, the point is whether or not this weapon was—

MR. SMITH: (Interposing) That is all.

THE COURT: You may step down, Mr. Carpenter.

(Witness excused.)

[350] GEORGE W. LEWIS, called as plaintiff's witness, being duly sworn, testified as follows:

BY THE CLERK:

Q Would you state your full name to the Court and jury, spelling your last name, please.

A George W. Lewis, L-e-w-i-s.

DIRECT EXAMINATION

BY MR. CRUM:

Q Mr. Lewis, by whom are you employed?

A I am employed by the Postal Inspector Service, Criminal Laboratory in San Francisco.

Q In what capacity?

A I am an Examiner of Questioned Documents.

Q How long have you been so employed?

A About five and a half years.

Q Okay. Would you briefly describe your duties?

A Yes. Our laboratory specializes only in problems concerned with questioned documents. My duties fall into several general areas. The first is the comparison and identification of handwriting, hand printing, typewriting and stamped impressions. We also, or I also examine cases involving documents that have been erased or obliterated. I examine cases involving questions concerning papers and inks and adhesives that have been used in the preparation of documents. I also process [351] documents for latent fingerprints and compare any developed latent fingerprints with fingerprints of the suspect. I make written reports of my findings in cases, and where necessary, I testify to my findings in a court or hearing.

* * * *

[366]

[TESTIMONY OF GEORGE W. LEWIS]

DIRECT EXAMINATION (Continuing)

BY MR. CRUM:

Q Now, Mr. Lewis, let's back up for a moment. I have handed you Court's Exhibit B and Plaintiff's Exhibit 13. Now, Court's Exhibit B are business records, are they not?

A Yes.

Q Do those business records contain a signature?

A Yes, there appears several signatures.

Q Are you going to testify or is part of your testimony going to be based upon some writings contained in those business records?

A Yes.

Q Have you compared those business records with any other [367] known handwriting of this defendant?

A Yes, I have.

Q Would that be No. 13?

A Yes.

Q What is Plaintiff's No. 13?

A Plaintiff's Exhibit 13 is a Postal Inspection Service Warning and Waiver Form.

Q Does that exhibit bear the signature of this defendant?

A It bears the signature of Josephine Powell.

Q All right. And you compared that signature with signatures contained in those business records?

A Yes, I did.

Q Based upon that comparison, have you reached a conclusion?

A Yes, that they were—sorry.

Q What is your conclusion?

A They were both signed by the same person.

Q Now, there's other information, other than the signatures in those business records, is there not?

A Yes.

Q Can you tell us whether or not the person that signed the business records also filled out the contents of the business records? Yes. In making my examination I did look for this, and I see no indication whatever that the person who signed the business records did not [368] also complete the business records. That is, yes, the person who signed them completed them.

Q That is your opinion?

A Yes.

Q What is that opinion based on?

A Simply that I see no indication otherwise that anyone else was involved in completing them.

Q Are there certain factors that lead you to that conclusion other than negative factors?

A Yes, positive factors along the same—although the business records have been written in different pens, depending on the time they were completed, each time the same colored ink has been used to complete the form, as was used to sign it. It was in the same style and character of the writing of the signature, and the written portion of the form.

MR. CRUM: I believe that is all I have, now, your Honor, with respect to that.

* * * *

[457]

[TRIAL PROCEEDINGS, NOVEMBER 30, 1973]

[TESTIMONY OF DEFENDANT,
JOSEPHINE POWELL]

* * * *

JOSEPHINE POWELL, called as a witness in her own behalf, being first duly sworn, testified as follows:

BY THE CLERK:

Q Would you please state your full name for the jury and the Court, please.

A Josephine Powell.

DIRECT EXAMINATION

BY MR. MOBERG:

Q Now, Josephine, when were you born?

A Tenth month, and the 27th day of 1943.

Q You probably will have to speak up and talk towards the jury.

A The tenth month, the 27th day of 1943.

Q You are approximately 30 years old, is that correct?

A Right.

[458] Q Were you born in the state of Washington?

A No, I was born back East.

Q And how long have you resided in or around the state of Washington?

A About 20 years.

Q About 20 years?

A Right.

Q Most of that time was in the Vancouver, Washington area, is that right?

A Right.

Q Your parents still live in the Vancouver, Washington area?

A Right.

Q I take it that your formal schooling—what kind of education have you had?

A Half of a semester of sophomore.

Q So you went through the ninth grade and a half semester of the tenth grade?

A Right.

Q This was again in the Vancouver area?

A Right.

Q Do you have any children?

A I have two.

Q And who are they, what are their names?

A Jeffrey Alstine and Douglas Alstine.

[459] Q These are children from a previous marriage, is that right?

A Right.

Q How long have you been in the Spokane area?

A About two years.

Q While in the Spokane area have you been employed?

A No.

Q Have you been attending school?

A Right.

Q What kind of schooling are you in now?

A Mostly basic, to get my high school diploma.

Q How long have you been in that program?

A I started November the 9th of 1972.

Q And what do you basically do? Do you attend school every day while you are on this program?

A Yes.

Q You attend classes?

A Right.

Q Again, I will probably have to tell you that you are going to have to speak up. The jury are quite a distance away over here and you have sort of a soft voice, and this is a big courtroom.

So, do you know of Travis Powell?

A Yes.

Q And when did you meet Travis Powell?

[460] A In '71, I think.

Q 1971?

A Right.

Q And you have known him since 1971, is that correct?

A Right.

Q You are not the wife of Travis Powell?

A No.

Q There was never a marriage ceremony or anything like that?

A Right.

Q And your true name, or your name before you met Travis Powell, was Josephine O'Connor?

A Right.

Q Is that your maiden name?

A Right.

Q That is the name of your parents?

A Right.

Q Now, do you recall what month you arrived in Spokane?

A About May, I think.

Q Of 1972 or 1971?

A No, before—hummm—since 7—it was in '72. It was before April.

Q Before April?

A Right.

Q And you enrolled in this school program shortly after [461] you arrived here then?

A No.

Q You didn't. When did you first enroll in your schooling?

A November of '72.

Q Are your children in school?

A Yes.

Q Jeffrey is ten. What grade would he be in?

A He is in the third.

Q The third grade?

A Right.

Q Douglas is seven and that would put him in the first grade?

A First grade.

Q Now, Josephine, did you have occasion to purchase a shotgun at some time?

A Yes.

Q And do you recall approximately the month or the day that you had occasion to purchase the gun?

A February the 21st.

Q February 21st, 1973?

A Right.

Q And obviously you had some reason to purchase that gun, did you not?

A Yes.

Q What was the reason that you went down and purchased the [462] shotgun?

A I purchased it more or less for protection of things going on. Some occasions there has been somebody in my house. I have come in my house, I have noticed things changed around a little bit other than when I left it, and I bought it because of what is going on in the people breaking into homes and so forth.

MR. CRUM: You're going to have to speak up.

THE COURT: I think if you turn your head to the jury rather than to counsel it would help.

Q (Mr. Moberg) Let's go over that one more time. It is important that the jury hear this. Do you want to again explain to the jury, for the reason that some of the jurors may not have heard you, your reasons for purchasing this gun on February the 21st, 1973?

A On occasions there were—

Q Talk directly to the jury.

A On occasions when I have come home when I have been gone there has been things moved around in my house that wasn't that way when I left and I bought the gun on what I have heard in the papers about men coming in the house and directly assaulting a woman and taking her money.

Q You basically purchased this gun for some sort of security for yourself?

A Right.

[463] Q When you purchased this gun did you have occasion to—well, when you purchased this gun, was it packaged or loose?

A Right, it was in a box.

Q It was in a package?

A Right.

Q You took the gun home that day, I suspect?

A Yes.

Q What did you do with it then?

A I put it in the closet in my bedroom.

Q Did you unpackage it before you did that?

A No.

Q When you got it home—are you familiar with how to clean a gun?

A No, not really.

Q You didn't assemble it or clean it or anything like that?

A No.

Q Just left it in the package?

A Right.

Q And you put it in your closet. Whereabouts in your closet did you put it? Did you put it in a drawer?

A On the shelf.

Q On a top shelf or bottom shelf?

A A bottom shelf, right.

[464] Q Had you at any time had occasion to or the need to return and see that weapon and/or use it?

A No, I didn't.

Q After having put that weapon in your closet, when was the next time that you had occasion to go and check to see, to pick that weapon up?

A I never picked it up.

Q Did you—do you recall when Inspector Hoots came to see you?

A Yes.

Q This was approximately April 16, I believe, of 1973?

A Yes.

Q Do you recall the occasion?

A I don't recall the date.

Q I believe from the previous testimony the date was sometime in April. And in April did you have occasion to go on the 16th in response to a request by Mr. Hoots, did you have occasion to go to the closet to check to see if the gun was there?

A Yes.

Q Was the gun there?

A No, it wasn't.

Q Is that the first knowledge you had of its disappearance?

A Yes.

Q Now, again, in regards to this conversation with [465] Inspector Hoots, would you—strike that. Inspector Hoots came out to your home sometime in April?

A Yes.

Q And you recall that?

A And he was with another gentleman, yes.

Q Would you get into the particulars—what was the purpose of his calling on you that day?

A More or less to see if I purchased a shotgun.

Q I see. And did he also inform you at that time that he was making some sort of an investigation of some possible violation of the mail laws?

A Yes.

Q And that was the time when he asked you if you had that gun and you responded yes, is that correct?

A Yes.

Q And then when you went to check the gun, the gun wasn't there?

A Right.

Q Did you come out and tell Inspector Hoots that?

A Yes.

Q What did you tell him?

A I says the gun is not here.

Q Did he ask why, or did you give him any explanation why it wasn't there?

A I don't recall if I did or not.

[466] Q Now, again you have a very soft voice and it's going to be very necessary for you to speak up so the jury can hear you. Okay?

A Yes.

Q Thank you. Do you know a Theresa Bailey?

A No, I don't.

Q Have you ever seen Theresa Bailey in your life?

A No.

Q Except for here in the courtroom?

A That's all.

Q In the times that you might have been visiting Travis Powell you have never bumped into Theresa Bailey?

A No.

Q Have you ever met Mr. George Bailey?

A No.

Q It is my understanding that it wasn't unusual for you to go visit Travis Powell?

A No, it wasn't.

Q As a matter of fact he was there from approximately September of '72 until March of '73, is that correct?

A Right.

Q And during those five or six months you visited him almost every month, is that correct?

A Right.

Q Now, directing your attention to March 8 of 1973, did [467] you visit Travis Powell on that day at McNeil Island?

A Yes.

Q And when you visited Travis Powell on this day, of course it was necessary for you to travel down to Tacoma from Spokane, is that right?

A Right.

Q You generally leave Spokane—how long does it take you to get from—how do you go from Spokane to Tacoma?

A Take a bus.

Q Take a bus?

A Right.

Q What time did you—would you have caught the bus, or did you catch the bus to get to McNeil for a visit on March the 8th?

A 8:30 in—

Q In the evening?

A Right.

Q So that would be March 7 that you caught the bus?

A Right.

Q It was necessary for you to get on a Greyhound bus from Spokane here at 8:30 in the evening of March the 7th, then that bus traveled to Tacoma and what time does that bus arrive at Tacoma?

A About 1:15 or 1:30.

Q About 1:15 in the morning?

[468] A Right.

Q So you arrived in Tacoma on March the 8th, although very early in the morning, 1 or 1:15 in the morning. Then I assume you arrived at the Greyhound Bus Depot?

A I took a taxi over to the Trailway bus.

Q Did you take a taxi to another bus station?

A Right, because that bus station is closed and you can't stay around that, and that's where I take the bus in the morning.

Q You catch the bus to go to Steilacoom?

A Yes.

Q At 1:15 you arrived in Tacoma. You then take a taxi to the Trailway Bus Station?

A Yes. I'm pretty sure that's the name of it.

Q Some name like that?

A Yes.

Q And it doesn't take you long in a taxi to get there, does it?

A No, it's not very far.

Q That's still relatively early in the morning, is that correct?

A Right.

Q Specifically on the day of March 8, did you wait in the bus depot?

A No, I waited for—I ate, about fifteen or twenty minutes, [469] maybe a half hour.

Q You ate, and then did you go get a room?

A Yes, I did.

Q Do you recall the name of the place that you stayed?

A No, I don't. It is just around the corner from the bus depot.

Q Just around the corner from the bus depot?

A Right.

Q And then I take it you rest there until you get a bus to Steilacoom?

A Right.

Q What time does the bus leave from this bus depot to go to McNeil Island?

A At 8:30.

Q 8:30 in the morning?

A Right.

Q So you catch this bus at 8:30. Where does that bus go?

A It goes to Steilacom and McNeil Island.

Q I take it Steilacom is on the mainland and McNeil Island is on the island?

A Right.

Q Is there a boat dock in or near Steilacom?

A Right.

Q You take the bus to Steilacom, and what time did you arrive at Steilacom?

[470] A 9 or 9:30.

Q 9 or 9:30 in the morning?

A Right.

Q Then I take it you have to catch a bus to McNeil Island?

A No, I take a boat.

Q I'm sorry. You take a boat. A bus would be very dangerous over the water I assume?

A Right.

Q What time does the boat leave?

A About 10 or 10:30.

Q 10 or 10:30 in the morning?

A Right. It gets over there about 11.

Q Then your visitation starts at 11:00 o'clock from the island, itself?

A Right.

Q Do you have any idea how many miles it might be from Tacoma to Steilacom?

A About fifteen miles.

Q Now, on March 8 at approximately 11:00 o'clock or so you then had an opportunity, you were on the island and had an opportunity to visit—

(A microphone is brought in to the witness chair.)

Q I think you ought to amplify your voice here.

THE COURT: Unfortunately this courtroom doesn't [471] have an amplifier. I don't think the jury is hearing all of her remarks.

Q State your name.

A Josephine Powell.

Q You are going to—you're going to have to hold that thing.

MR. MOBERG: Is the jury getting that now?

(Jurors respond yes, thank you.)

Q Now, this may be a little difficult for you, you probably will have to hold up, not real close to your mouth, but so we can hear it and probably you will have to make sure it doesn't drift away.

At approximately 11:00 o'clock on March 8 you began your visitation with Travis Powell at McNeil Island?

A Yes.

Q What are the nature of those visits? Where do you do your visiting, in a private room?

A No.

Q In a public room?

A Right.

Q What kind of a room is it?

A Oh, it's just a big room, something like this one here, just with the chairs and little tables.

Q So a lot of people are visiting at the same time, is [472] that right?

A Right.

Q And so you generally stay there through the entire visiting hours, is that correct?

A Yes.

Q And the visiting hours are spent in this room?

A Yes.

Q What time are visiting hours over there?

A About 3:15 to 3:20 or somewhere around there.

Q At that time, at that point you have to catch a boat back to the mainland, back to Steilacom?

A Right.

Q What time does that boat leave?

A If there is no delay, about a quarter to four.

Q About a quarter to four, and it's a short boat ride, so what time are you in Steilacom then?

A Well, there's a bus that comes back that picks up the ones that take the bus. I took a bus from there back to—

Q You picked up a bus in Steilacom, Washington?

A Right.

Q Then you returned on that bus to Tacoma?

A Right.

Q What do you recall as to what time the bus from Steilacom leaves for Tacoma?

[473] A Well, it leaves directly from there and just makes its regular rounds.

Q No, I mean what time does it leave Steilacom? You get off the boat and then—

A Oh, about 4:30 or 5.

Q About 4:30 or 5 it leaves Steilacom?

A Right.

Q And proceeds on to Tacoma?

A Right.

Q And then what time does it arrive in Tacoma, do you recall?

A Oh, about 5:30 or 6, somewhere around there.

Q You can't remember exactly. You don't work for the bus depot. Somewhere around there?

A Yes.

Q Then you catch a bus that takes you back to Spokane?

A Right.

Q What time did you generally arrive in Spokane?

A At 1:15.

Q In the morning again?

A Right.

Q So from the start of this whole trip to the end, you're either in a bus or visiting your husband, is that correct?

A Right.

Q And these buses generally travel through the night?

[474] A Right.

Q And when you arrive in Spokane at approximately —this would be March the 9th, now would it not?

A Right.

Q Approximately 1:15 or so?

A Right.

Q Does somebody pick you up at the bus depot?

A Yes, my brother and sister-in-law.

Q I take it by that time you're probably pretty exhausted?

A Yes.

Q Do they take you directly home?

A Yes.

Q And you went to bed?

A Right.

Q Now, on the morning of March 9th, did you attend school?

A What?

Q Did you attend school on the morning of March 9th?

A Yes.

Q This is the program that you described earlier in your testimony?

A Yes.

Q What time does school start in the morning?

A Oh, 9:00 o'clock.

Q So you were in school at 9:00 o'clock in the morning and to the best of your recollection on March the 9th, do [475] you recall what time you might have gotten out of school?

A 1:30 or a few minutes earlier. Sometimes the teacher dismisses earlier than the regular time.

Q You don't specifically recall whether you got out early that day or not, do you?

A No, I don't.

Q And from there you get out sometime before or at 1:30. On March the 8th did you go directly home or did you go directly home?

A Yes, I did.

Q How far was your home at that time from the school campus?

A About ten blocks from there.

Q So you didn't live very far away from school, did you?

A No.

Q How long did it take you to get home?

A About a quarter to two.

Q Ten or fifteen minutes and you are home?

A Yes.

Q Did you stay at home?

A No, I did not.

Q On March the 9th. Were your children home at that time?

A Yes.

[476] Q Was somebody caring for them?

A Yes.

Q Who was caring for them?

A Barbara Powell.

Q Is she related to you in any way?

A She is my sister-in-law and brother-in-law's daughter.

Q She is your sister-in-law's and brother-in-law's daughter. Does Barbara care for your children from time to time?

A Quite often.

Q Quite often she will sit with the children. At that time were both your children in school?

A No, they weren't.

Q So when you arrived at approximately a quarter to two or so, Barbara was there with the kids and what did you do?

A I put the kids in the car, put their coats on first, and took my baby-sitter home.

Q So you were going to take Barbara home?

A Right.

Q Barbara lives with Hardy Powell?

A Right.

Q So you packed the kids in the car and left your home to take Barbara home. Now, did you return to your home after delivering the baby-sitter?

[477] A Late that evening.

Q Where did you stay?

A I was at my sister-in-law's and brother-in-law's place.

Q Hardy and Nellie, is that her name?

A Right.

Q That is where Barbara lives?

A Right.

Q So you took Barbara in and the kids went in and you stayed there?

A Right.

Q Now, do you often visit Hardy and Nellie?

A Quite often.

Q Hardy Powell is related to Travis Powell, is he not?

A Right.

Q And isn't—strike that. Have the Powells, Hardy and Nellie, on occasion accompanied you to visit Travis?

A Yes.

Q And they, of course, Travis is Hardy's brother and when you would go visit Travis Powell, are they generally the ones that pick you up at the bus depot?

A Yes.

Q And I imagine they are always quite curious about how the visit went and stuff like that, is that true?

MR. CRUM: Your Honor, I hate to object but I think it's leading.

[478] THE COURT: Yes, it is.

MR. MOBERG: I will rephrase that question.

Q On March 9, then, having taken Barbara to the Powells and you went in and stayed the evening, did you stay there for dinner?

A Yes.

Q Did you have casual conversation?

A Yes.

Q Just spent an evening there?

A Yes.

Q Did you—how long did you stay there?

A Until about 10 or 10:30.

Q It was late in the evening?

A Right.

Q Then you went home and that would be Friday night, would it not?

A Right.

Q Is it unusual for you to visit the Powells after you have visited Travis?

A No.

Q When you say no, why isn't it unusual?

A Well, a lot of times I go over there and talk to them and discuss it. How Travis was. They like to know how he feels and how he is.

Q Okay. This visit on March the 8th, is that the last [479] time you visited Travis Powell?

A Yes.

Q Now, had you visited Travis Powell after March the 8th?

A No, I didn't.

Q Did you have any communication with him other than a letter after March the 8th?

A No.

Q Now, had you arranged, or had you planned to go down and visit Travis again during the month of March?

A Yes.

Q I'm sorry. You'll have to again hold the mike up.

A Yes.

Q Did you ever effect that visit?

A No, I didn't.

Q Why didn't you?

A I got a call Wednesday, the night that I was going to get on the bus and go up there to see him, about 3 or 3:30 and a man that Travis had called had asked him to call me to tell me not to come up that, not to waste my money to come up because I couldn't get in, I couldn't see him. Then he said that Travis was transferred.

Q That Travis was transferred?

A Yes, right.

Q Did you ask him why?

[480] A No, I did not.

MR. CRUM: Object to that as hearsay.

Q Well, without telling me the response to your question, did you ask him why?

A No.

Q Was there any special reason you didn't ask him why he had been transferred?

A Yes.

Q What reason was that?

A Because I figured if they just transferred him, they wouldn't tell me where he was transferred anyway.

Q Why did you think that?

A Because they very seldom let a person know where they are going to be transferred, if they are transferred that day or a day ahead.

Q So subsequent to that conversation and that visit, did you try to find out why Travis was being transferred or where he was being transferred to?

A Yes.

Q What did you do in that regard?

A Well, after I didn't—I still kept on receiving letters from there. I understood that he was transferred or what.

Q You called McNeil Island?

[481] A Right.

Q And did they give a satisfactory explanation?

A They told me he was not transferred, that he was put in security.

Q He was in security?

A Right.

Q And you couldn't see him?

A Right.

Q Did you do anything else besides calling McNeil Island to find out why Travis Powell was put in security?

A Yes, I went down to the Legal Aid service.

Q And did you ask them to assist you?

A Yes.

Q So they were, I take it, going to check into this matter as well?

A Right.

Q Now, this would have been sometime late in March, is that correct, when you were doing this checking and stuff?

A Right.

Q Now, do you recall a visit that you had from Inspector Hoots around April 16 of 1973?

A Yes.

Q And what transpired, as you recall, in that visit with Inspector Hoots?

[482] A Well, he came to the door.

Q You have to hold that mike up there again.

A He came to the door, I opened the door, and there were two of them.

Q And do you recall the other inspector's name?

A No, I don't.

Q Go ahead.

A They came to the door and said who they were, and I believe Mr. Hoots showed his identification.

Q I see.

A At that time, and he told me a—

Q Did he, after he identified himself, did he ask you who you were?

A Yes.

Q Did you have any discussion after that?

A He asked me if I purchased a shotgun and I told him yes.

Q Now, Inspector Hoots has testified that he came to the door, that he identified himself, identified you, and then informed you of your rights, do you recall him doing that?

A Yes.

Q Did he read a rights form off to you?

A Yes.

Q As you recall, was it that you were advised that you could remain silent and you don't have to answer questions [483] and you're entitled to have an attorney, is that the kind of form he was reading as you recall?

A Yes.

Q Did he do that before he asked you any questions?

A He did, other than asking about my name.

Q Except for your name?

A Right.

Q He read you those rights. At that point, having informed you of all these rights, did he explain why he had just read that rights card to you?

A He said about a package being mailed or something being mailed.

Q They were investigating something like that?

A Right.

Q Is it at that time that he asked you if you owned a certain gun?

A Yes.

Q And your response to that was what?

A Yes.

Q Yes, you did own it?

A Yes.

Q And then do you recall—I believe Inspector Hoots' testimony was to the effect that he might have asked you where it was or what you did with it or what you might have done with it. Do you recall if he asked [484] anything like that?

A Yes.

Q And to the best of your recollection what do you recall that he asked?

A He asked me where my gun was and I said it's in the bedroom.

Q You said it was in the bedroom?

A Right.

Q Then you offered to go get it?

A Right.

Q And that is when you went to the bedroom and discovered that the gun wasn't there, is that right?

A Right.

Q Now, at that time did Inspector Hoots ask you to give him a sampling of your handwriting?

A Yes.

Q What did you do?

A I said no.

Q Was that the first time you had heard anything about any possible violation of mailing regulations?

A Yes.

Q And before that, before that visit with Inspector Hoots, you heard nothing about it, is that correct?

A Right.

Q Were you concerned when Inspector Hoots appeared at [485] your door and asked you these questions?

A I didn't know what in the heck was going on.

Q So he asked you for your handwriting sampling and you said no?

A Right.

Q That was sometime around the middle of April. Now, was was the next contact that you had with Inspector Hoots?

A At the time that I was arrested.

Q Do you recall the approximate time that you were arrested?

A It was in the afternoon.

Q No, I mean the date, I'm sorry.

A No, I don't.

Q Do you recall the month?

A No, I don't.

Q Pardon?

A No, I can't.

Q It was sometime later though, was it not?

A Yes, about four or five months later after the first time he was out.

Q Now, in between the first contact you had with Inspector Hoots and the date of your arrest, did anybody else from the United States Government talk to you about this case, or this possible violation that Inspector Hoots had talked to you about?

[486] A Would you say it again?

Q That was probably a pretty confusing question, but in other words, Inspector Hoots talked to you on April the 16th or sometime around then?

A Right.

Q And you were arrested, you said, some four or five months later?

A Four or five months later.

Q In between those two dates did anybody from the United States Government talk to you about this case?

A No.

Q Or ask you any more questions?

A No.

Q Now, Josephine, before you is what is marked as Plaintiff's Exhibit No. 6, which is a package with some mailing stamps on them. Would you inspect that package, please?

A (Witness looks at package)

Q Have you ever seen that package before?

A No, I haven't.

Q Except in trial.

A That is the only time.

Q Is the writing on that package your writing?

A No, it isn't.

Q And your testimony is that you never have seen that [487] package before?

A Right.

MR. MOBERG: (To the bailiff) You can remove that package, and thank you. While you are there, I think I need also to get Exhibit No. 7.

Q Now, the bailiff has handed you what is marked Plaintiff's Exhibit No. 7, that has been referred to throughout this trial as a sawed-off shotgun. Would you examine that exhibit, please?

A (Witness looks at exhibit)

Q Now, have you ever seen that sawed-off shotgun before?

A No, I haven't.

MR. MOBERG: (To the bailiff) You can take that exhibit down.

Q Now, the bailiff is passing up to you Exhibit No. 8, which is two boxes and they contain shotgun shells. Would you inspect those boxes, please?

A (Witness looks at boxes)

Q Are there price tag identifications on those boxes?

A I don't see any—oh, here's one, \$4.47.

Q Is there a name on that price tag?

A Fred Myers.

Q Fred Myers. Now, have you ever seen those two boxes or two similar boxes of shells like that?

A No, I haven't.

[488] Q Now, Josephine, this question might seem repetitive. You testified you have never seen those boxes, but it is an important question and it is one that is on the minds of the jurors as well. And I'm going to ask you now, did you mail the package that contained that sawed-off shotgun from Spokane on March 7?

A No, I didn't.

Q Did you mail any package from Spokane on or about March 7, containing any weapon?

A No.

Q Do you have—strike that. It is your testimony then that the first knowledge that you had of this weapon, or possible postal violation was when Mr. Hoots, or Inspector Hoots, contacted you on April 16?

A Yes.

Q Now, I'm going to ask you one other question. Did you make any phone calls to Theresa Bailey on March 9, 1973?

A No.

Q Now, how—earlier in your testimony you indicated that you had purchased a shotgun because of the misarrangement in your house and certain items ended up in different places from when you left, and when you arrived during that time, had you been having problems with your home in any way?

A On a couple of occasions there's been kids in my house.

[489] Q There's been kids in your house?

A (Witness nods)

Q What other kinds of things have been happening—

A Well—

Q In your home. You have to hold the mike up when you talk.

A On one occasion I was there by myself, upstairs asleep, and the kids were over at Nellie's at that time, and I had the fan on upstairs and when I came downstairs the phone was moved and it wasn't in the same place I left it before I went upstairs.

Q Were any other sorts of things happening around your home like that, that you recall?

A Right, there was another time that I was gone and my brother-in-law was checking on the house, and their kids came down there to feed the dog and so forth, and there were kids up in the upstairs at that time. They were yelling and he went back and told his dad and he came down.

Q And that, for that reason, and some concern you had generally in the kind of violent crimes, you felt it was necessary to purchase the gun for your protection?

A (No answer heard)

Q When you purchased that gun, did you purchase any shells?

A No.

[490] Q Now, why didn't you purchase any shells?

A Well—

Q You have to keep that mike up there.

A I didn't purchase the shells because I just wanted anybody looking down the barrel of the shotgun is pretty well, you know, they're scared of that in the first place.

Q You mean, or are you saying that you never had any intention of using that shotgun?

A No.

Q It wasn't your intention to load it and shoot somebody?

A No.

Q But you were going to use it as some sort of a scare thing?

A Yes.

Q And did you ever unpack that gun after you purchased it?

A No.

Q Now, is it correct there, you lived for some time on an address at North Lee, is that right?

A Yes.

Q When did you move from that address?

A Around September, I would say.

Q Around September of this year?

A Right.

Q So you lived in this North Lee address through September?

[491] A Right.

MR. MOBERG: If I could have a moment, your Honor, to confer with counsel.

THE COURT: All right.

(Mr. Moberg confers with Mr. Smith.)

MR. MOBERG: Could we get Exhibit 3?

Q The bailiff is handing you what is marked Exhibit 3 previously identified as the gun that you purchased at the General Store. Now, would you inspect that and state if you recognize that gun?

A It looks like the gun I bought.

Q It looks like the gun you bought?

A Right.

Q But you can't testify whether that is the exact one?

A No.

Q But it is correct that it looks like the one that was shown to you in the store?

A Right.

Q Now, when you purchased that gun in the store, was the gun out and then did the man package it or what?

A He just showed me an example of the gun I wanted, and then he just went and got the gun that was supposed to be like that in a box, sealed.

Q How big was that box, if you recall?

[492] A Well, I would say it was about like this and about like that (indicating), about that big.

Q And that is the box that you took home with you?

A Right.

Q Did you ever—strike that. Did you make any effort to clean that gun after you purchased it or do anything with it after you purchased it?

A No.

MR. MOBERG: (To the bailiff) You can remove the exhibit now.

Q The bailiff has put before you a double-barreled shotgun marked Exhibit No. 2. Now, would you inspect that exhibit?

A Yes, (witness puts on glasses and looks at exhibit).

Q Have you ever seen that weapon before, except at the trial?

A No.

Q Have you ever seen a weapon similar to that?

A No.

Q Now, there is some packages there in front of you, and one of them, the top one I believe, is the Exhibit No. 5. Would you inspect the contents of that package?

A (Witness looks at the contents of the package.)

Q Have you ever seen the contents of that package or anything like it?

[493] A Would you say that again?

Q Have you ever seen what you inspected there as the contents of that package?

A No.

Q Now, would you make the same inspection of that last exhibit there?

A (Witness looks further at another exhibit)

Q And those appear to be boxes of shotgun shells, do they not?

A Right.

Q Now, I'm going to ask you the same question, have you ever seen those boxes of shells?

A No.

MR. MOBERG: They can be removed now.

Q Josephine, referring to the gun that you purchased, do you recall what time of the day it might have been that you went down to the General Store?

A In the afternoon.

Q In the afternoon. And you talked to a salesman there?

A Yes.

Q And I take it that at the time you were purchasing the salesman, what did he show you, several guns?

A Yes, two at least.

Q Pardon?

A Two at least.

[494] Q And after he showed them to you, and so that I understand this, you showed him the kind of gun you wanted from the ones he showed you, is that correct?

A The best looking one.

Q Did you take that specific gun back to the back room with him, do you recall, the one that he showed you?

A I think they were the ones he had just for examples. He had it back there on the back wall.

Q You think they were a show kind of gun?

A Right.

Q You said you wanted something like that?

A Right.

Q So I take it from the testimony that he went to the back room and he brought out a package?

A Right.

Q And that package described as wide, sort of by your hands. What else was on that package, do you remember? Do you remember its color?

A It was brown, wrapped in brown paper, and then it had tape on the ends, taped over.

Q The package was taped shut?

A Right.

Q And do you recall any special markings that you might have remembered on it?

A I noticed it was some kind of a—I don't know if it was [495] a number or serial, or—but I didn't know that.

Q There were numbers?

A On the outside of the package.

Q Now, you took this gun home. Have you taken any firearms courses or anything like that?

A No.

Q Do you feel trained in handling a firearm like that?

A Well, I wouldn't say I am an expert with a gun, no.

Q When you took that gun home and you put it in your closet and left it there, did you intend to have somebody show you how to put it together?

A Yes.

Q Who was that?

A I was going to have Hardy Powell put it together for me.

Q He was going to show you how to put it together and at that point did you know how to clean a gun?

A No.

Q Did you know they even needed cleaning?

A I assumed when I bought it new and stuff it was clean.

Q You assumed they are clean when they are bought new?

A Right.

Q Did Hardy Powell ever come over and show you how to put this gun together?

A No.

Q Now, I notice that Mr. and Mrs. McDaniels are not in [496] the courtroom. Those are the people that testified they sold you another gun, other than the one you own. So I am asking you to remember back to that

time and tell me have you ever seen Mr. or Mrs. McDaniel before in your life?

A No, other than in the courtroom here.

Q Other than in the court here. Now, Mrs.—Mrs. McDaniels testified that—strike that. Since you have been in Spokane and up through March have you ever owned a white coat?

A No.

Q A white car coat?

A No.

Q Do you own any white coat at all?

A No.

MR. MOBERG: I believe that is all.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 74-884

UNITED STATES, PETITIONER

v.

JOSEPHINE M. POWELL

ORDER ALLOWING CERTIORARI. Filed March 17, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

No. 74-884

Supreme Court, U. S.

FILED

FEB 20 1975

In the Supreme Court of the United States

October Term, 1974

United States of America, Petitioner

v.

Josephine M. Powell

**BRIEF IN REPLY TO THE UNITED STATES
GOVERNMENT'S PETITION FOR A WRIT
OF CERTIORARI**

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October Term, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPHINE M. POWELL

**BRIEF IN REPLY TO GOVERNMENT'S
PETITION FOR WRIT OF CERTIORARI**

OPINION BELOW

The opinion of the court of appeals (App.A) is reported at 501 F.2d 1136.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), as the United States seeks review of the opinion of the United States Court of Appeals for the Ninth Circuit reversing respondent's conviction.

STATUTES

18 U.S.C. 1715 provides in part:

Pistols, revolvers, and other firearms capable of being concealed on the person are

nonmailable and shall not be deposited in or carried by the mails or delivered by any officer or employee of the Postal Service. Such articles may be conveyed in the mails, under such regulations as the Postal Service shall prescribe . . .

QUESTIONS PRESENTED

1. Whether a statute prohibiting the mailing of "pistols, revolvers, and other firearms capable of being concealed on the person" is clear and definite enough to escape a challenge that the statute is unconstitutionally vague as applied to short barreled shotguns with overall length of 22 inches.

2. Whether or not a statute which is unclear and indefinite on its face can become constitutionally definite by use of administrative regulations promulgated pursuant to said statute.

COUNTER-STATEMENT OF THE CASE

Respondent was charged with mailing an un-mailable item in violation of 18 U.S.C. 1715, to-wit: a sawed-off shotgun of an overall length of 22 1/8 inches. Respondent was convicted after jury trial in United States District Court for the Eastern District of Washington.

Respondent appealed her conviction arguing that the statute was unconstitutionally vague when applied to short-barreled shotguns such as the one the Respondent was charged with mailing.

The Court of Appeals agreed with Respondent's vagueness challenge and reversed Respondent's conviction. The Court said in part:

Although little question can be raised as to the concealability on the person of a pistol or revolver in common recognition of the normal limits of their size, the statutory prohibition as it might relate to sawed-off shotguns, is not so readily recognizable to persons of common experience and intelligence. (App. A, page 2a)

RESPONDENT'S ARGUMENT FOR DENYING PETITIONER'S WRIT OF CERTIORARI

Petitioner's argument in support of its application for a writ seems to be twofold. First, Petitioner argues that the Court of Appeals could not, under Respondent's attack of vagueness, invalidate the statute (18 U.S.C. 1715) as that statute applies to short-barreled shotguns and similar shoulder guns, since, according to Petitioner, Respondent lacked standing to raise such an issue.

Secondly, Petitioner argues that any vagueness of 18 U.S.C. 1715 could be cured by bootstrapping the criminal statute with federal administrative regulations adopted by the Postal Service. Petitioner raises this second argument initially before this Court.

1. In a circuitous argument, Petitioner claims that since Respondent's conduct is properly subject to the terms of the statute, she may not then attack the statute's constitutionality. However, in order to make the argument Petitioner must assume as fact the very issue of Respondent's appeal. That is, whether or not the statute is in fact definite

enough to include in its proscription the conduct of the Respondent. The Court of Appeals ruled that the statute was not so definite. Except for Petitioner's bare assertion, Petitioner has made no showing to the contrary.

Respondent does not contend that the statute is unconstitutionally vague as it applies to pistols, revolvers and other firearms of the same general class as pistols and revolvers. The Court of Appeals impliedly upheld the definiteness of this statute when applied to pistols and revolvers. The Court's invalidation of the statute was directed towards short-barreled shotguns and other shoulder weapons such as is found in Respondent's case.

Respondent's challenge to the statute lies only with this larger and different class of weapons like sawed-off shotguns and short-barreled shotguns. Contrary to Petitioner's statement in it's Petition for Writ of Certiorari, the instant case is an appropriate case in which to consider "the statutes potential for uncertain application to larger weapons . . ." (Page 6, Petitioner's petition for Writ of Certiorari).

As Respondent argued before the trial Court and the Court of Appeals, a fair construction of the statute would have it apply only to pistols, revolvers, and other firearms of the handgun class. The statute's language makes nonmailable pistols, revolvers, and other firearms capable of concealment. Applying the principles of *Esjudem Generis* to the construction of this statute (18 U.S.C. 1715) specific language in the statute (pistols and revolvers) would restrict and define the more general language of the

statute (other concealable firearms). Therefore, the proper legal, as well as, common sense construction of the statute would be that concealable firearms in the class of pistols and revolvers would be nonmailable. Under such an interpretation the statute is not definite enough to give a person of ordinary intelligence fair notice that also included in this list of nonmailable weapons would be *shoulder guns* such as short-barreled shotguns. Indeed, such shoulder weapons are not normally considered concealable.

The use of the word *firearms*, in this statute, does not provide any additional support to Petitioner's argument that shoulder weapons such as short-barreled shotguns would be included in the prohibition of the statute. Firearms is a broad generic name for guns whether they be large or small. While the word helps define the statute as to the type of weapons that are nonmailable, (guns as opposed to knives, etc.) it does not add to the definition of the statute concerning the size of the firearm that is nonmailable. In fact, in *Cokley v. People*, 450 P.2d 1013 (Colo 1972) in a case strikingly similar to the one at bar, the Colorado Supreme Court held that sawed-off shotguns did not fall within the terms of "firearms as defined by law."

Firearms capable of being concealed does not normally bring to mind short-barreled shotguns. Short-barreled shotguns are not generally concealable. Indeed, the opinion of the Judges of the Court of Appeals was that such short-barreled shotguns are not generally considered concealable.

Petitioner's challenge to the ruling of the Court of Appeals does not seem to concern itself with the

issue of the vagueness of the statute as much as it does with Petitioner's belief that short-barreled shotguns should be nonmailable items. However, whether or not short-barreled shotguns should be nonmailable was not the issue before the Court of Appeals and it is not the issue before this Court. Petitioner argues that it was the intent of Congress that the mailing of such short-barreled weapons should be prohibited (a premise not necessarily found in the statute) and therefore, the statute should be interpreted to prohibit such conduct.

However, the issue before this Court is not the congressional intent of the statute, but whether or not the *language* of the statute is so clear and definite as to apprise the person of reasonable and ordinary intelligence that the statute prohibits the mailing of short-barreled shotguns. The Court of Appeals concluded that the language was not so definite and that if it was truly the intent of the legislature to proscribe such activity, then the statute could be drafted in language more definite so as to include short-barreled shotguns within its prohibition.

Indeed, the Petitioner's argument could be raised in every case where there has been a successful challenge to the vagueness of a criminal statute. There is activity on the periphery of many statutes that may or may not have been intended by the legislature to be included in proscription of the statute. However, the test of the definiteness of a statute is not the intent of the legislation but the specificity of the language of the statute when ap-

plied to the activity meant to be proscribed. Also, this decision of whether or not a statute is constitutionally vague must be decided against the background that statutory interpretation requires criminal statutes to be strictly construed.

Petitioner has made no argument of statutory construction or definition of words involved in the statute which would give a more definite meaning to this statute than was concluded by the Court of Appeals. There is no reason then why this Court should review the opinion of the Court of Appeals. The Petitioner's application for a writ should be denied.

Secondly, the Petitioner argues that any indefiniteness in the statute has been cured by certain administrative regulations promulgated by the Postal Department and relating to this statute. Petitioner, in making this argument, must start with the premise that the statute is indefinite and vague as applied to short-barreled shotguns. The question then is if an indefinite criminal statute can be bootstrapped to a constitutionally definite status by the use of administrative regulations. Petitioner has cited no authority to support this argument.

Administrative regulations are not law. The purpose of administrative regulations is to create the *procedures* for carrying out the directives of the statute. It has never been the purpose of administrative rules and regulations to clarify or define portions of statutes that may otherwise be indefinite.

To permit administrative regulations to make otherwise constitutionally indefinite statutes con-

stitutionally certain would be to grant to administrative agencies the power to adopt, amend or repeal Federal statutes; a power that belongs exclusively with Congress and one that may not be delegated.

In the instant case the applicable administrative regulation states that all short-barreled shotguns of less than 26 inches shall be considered nonmailable. Petitioner then argues that irrespective of the statute's language, the administrative regulation makes it unlawful to mail a short-barreled shotgun of less than 26 inches. Following Petitioner's argument to its logical conclusion, if the Postal Service amended it's regulation to include 30 inch or 40 inch or 50 inch weapons, then these weapons would also fall under the statutes prohibition. Effectively, the administrative agency would have the power to alter or even emasculate a statute. Such is not the function of an administrative agency.

Petitioner's argument has even less force when one closely reviews the statute and regulations involved in this case. The only administrative authority granted to the Postal Service by 18 U.S.C. 1715 was the authority to adopt certain rules and regulations prescribing the manner in which nonmailable articles could be mailed by certain agencies such as the United States Army. The Postal Service was not authorized by the statute to determine what items would and what items would not be mailable but was only granted the rule making power to determine the *procedure* for mailing nonmailable items. The legislature did not intend to delegate and could not delegate to the Postal Service the

authority to define the crime charged in 18 U.S.C. 1715.

Finally, this issue, while novel in its approach, cannot be fairly considered by this Court. Petitioner's argument was not raised before the trial court or the Court of Appeals. Petitioner, however, argues that although the argument was not presented to the Court of Appeals, the Court of Appeals should take judicial notice of the regulation and hence judicial notice of Petitioner's argument. While the Court of Appeals may take judicial notice of the administrative regulation, (and indeed we must assume that the Court of Appeals was aware of the administrative regulations cited by the Petitioner) the Court of Appeals is not required, *sua sponte*, to raise Petitioner's argument. In fact, if we must presume anything, we must presume that the Court of Appeals raised Petitioner's argument on its own and after considering the same, ruled against such an argument. An argument of this magnitude being raised for the first time before this Court, should not be considered.

Therefore, Respondent respectively concludes that the Government's petition for Writ of Certiorari should be denied, and the mandate of the Court of Appeals for the Ninth Circuit should be carried out.

Respectively submitted.

JERRY J. MOBERG
Court Appointed
Counsel for Respondent

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 74-1252

United States of America, Plaintiff-Appellee

vs.

Josephine M. Powell, Defendant-Appellant

(August 7, 1974)

**Appeal from the United States District Court
for the Eastern District of Washington**

OPINION

**Before: MERRILL and ELY, Circuit Judges, and
REAL,* District Judge**

PER CURIAM:

Appellant was convicted of a violation of 18 U.S.C. § 1715 for depositing in the United States mail a firearm capable of being concealed on the person, to wit: A sawed-off shotgun.

*Honorable Manuel L. Real, United States District Judge, Central District of California, sitting by designation.

18 U.S.C. § 1715 provides in its pertinent part:

"Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable . . . Whoever knowingly deposits for mailing or delivery or knowingly causes to be delivered by mail according to the direction thereon . . . any pistol, revolver, a firearm declared nonmailable by this section . . . shall be fined not more than \$1000 or imprisoned not more than two years, or both."

Appellant attacks her conviction on the basis that 18 U.S.C. § 1715, insofar as it encompasses ". . . firearms (other than revolvers and pistols) capable of being concealed on the person," is unconstitutionally vague in violation of the Fifth Amendment due process. We agree.

Although little question can be raised as to the concealability on the person of a pistol or revolver in common recognition of the normal limits of their size, the statutory prohibition as it might relate to sawed-off shotguns is not so readily recognizable to persons of common experience and intelligence. *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). The statute refers to "firearms capable of being concealed on the person . . ." Did Congress intend that this "person" be the person mailing the firearm, the person receiving the firearm, or, perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season? We believe that this question, of itself, demonstrates the impermissible vagueness of the statute and its inadequacy to define the intended offense with sufficient specificity.

To require Congress to delimit the seize of the firearms (other than pistols and revolvers) that it intends to declare unmailable is certainly to impose no insurmountable burden upon it; and its failure to do so is an infirmity in draftsmanship of constitutional proportions.¹

Having decided the unconstitutional vagueness of this statute as it is applied to "other firearms," we need not reach the other assignments of error made by appellant.

The judgment is reversed.

¹ Innumerable State legislatures have met the challenge. *See, e.g.*, California Penal Code § 12001; Oregon Revised Statutes §166.210; Revised Code of Washington § 9.41.010.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 74-1252

DC C-9634

United States of America, Plaintiff-Appellee

vs.

Josephine M. Powell, Defendant-Appellant

**Appeal from the United States District Court
for the Eastern District of Washington**

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington and was duly submitted.

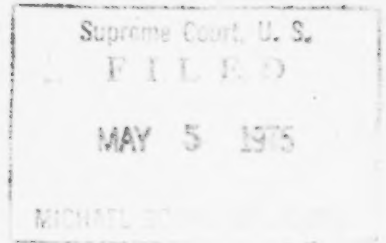
ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

**A True Copy
Attest 1/10/75**

EMIL E. MELFI, Jr., Clerk

**by /s/ Ray Hewitt
RAY HEWITT, Senior Deputy**

Filed and entered August 7, 1974



No. 74-884

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPHINE M. POWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 74-884

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 501 F. 2d 1136.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1974 (Pet. App. 4a). The court of appeals permitted the government to file an untimely petition for rehearing and suggestion for rehearing *en banc*, which it denied on November 21, 1974 (Pet. App. 6a). By order of December 13, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 20, 1975. The petition was filed on January 17, 1975, and was

granted on March 17, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a statute prohibiting the mailing of firearms "capable of being concealed on the person" is unconstitutionally vague on its face.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

The Fifth Amendment to the Constitution provides in relevant part:

No person shall * * * be deprived of life, liberty, or property, without due process of law
* * * .

18 U.S.C. 1715 provides in relevant part:

Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable and shall not be deposited in or carried by the mails or delivered by any officer or employee of the Postal Service. Such articles may be conveyed in the mails, under such regulations as the Postal Service shall prescribe [to enumerated recipients] * * * .

39 C.F.R. 124.5 provides in relevant part:

(a) *Nonmailable firearms.* (1) Pistols, revolvers, and other similar firearms capable of being concealed on the person, addressed to persons other than those indicated in § 124.5(b), are nonmailable.

* * * * *

(4) The phrase "all other firearms capable of being concealed on the person" includes, but is not limited to, short-barreled shotguns, and short-barreled rifles.

(5) The term "short-barreled shotguns" means a shotgun having one or more barrels less than 18 inches in length and any weapon made from a shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches. A short-barreled shotgun of greater dimensions may also be regarded as nonmailable when they [sic] have characteristics allowing them to be concealed on the person.

* * * * *

STATEMENT

1. On February 28, 1973, Mrs. Theresa Bailey received in the mail an unsolicited package postmarked Spokane, Washington, and addressed to her at her residence in Tacoma, Washington (A. 9-17). This package contained two shotguns, shotgun shells, and hacksaw blades (A. 13-16, 26). Mrs. Bailey did not know who had sent the package and did not retain the outer wrapper (A. 17). She contacted her husband, an inmate in McNeil Island Federal Penitentiary, who told her he knew nothing of the package or its contents (A. 8-10, 17, 38-39).¹

Mrs. Bailey subsequently met with agents of the Federal Bureau of Investigation and an official of the penitentiary. She turned the package and its contents over to them (A. 17-18, 51-52). The ensuing investigation established that one of the shotguns had been purchased by respondent in Spokane on February 21, 1973 (A. 87-88) and that the other had been

¹ Respondent's husband, Travis Powell, also was incarcerated at McNeil Island (A. 107, 112).

purchased on the same date by a woman of respondent's general description (A. 89-90).

On March 9, 1973, Mrs. Bailey received a telephone call from a woman who advised her that "a second package was coming, and it was a mistake" (A. 18-19). The caller, who did not identify herself, asked Mrs. Bailey to give this package to "Sally."² When Mrs. Bailey replied she "did not have an address or any way of giving it to Sally," the caller said she would call back (A. 19). The Federal Bureau of Investigation ascertained after investigation that the telephone call had been placed from respondent's residence in Spokane (A. 92-94; Tr. 263, 501).

Mrs. Bailey received the second package in the mail on March 13, 1973, and gave it unopened to the investigating agents (A. 19-20, 55-56). The package bore respondent's return address (A. 83).³ This second package contained a sawed-off shotgun (with a barrel length of 10 inches and an overall length of 22 $\frac{1}{8}$ inches), together with two boxes of shotgun shells (A. 56, 58-59, 96-97).

2. Respondent was indicted on a single count of mailing a firearm capable of being concealed on the person, in violation of 18 U.S.C. 1715. She moved to dismiss the indictment on the ground that the statute is unconstitutionally vague. The district court denied

² Mrs. Bailey did not know who "Sally" might be, nor did she recognize the caller's voice (A. 19).

³ A handwriting expert testified that, in his opinion, respondent had written the addresses on this package (A. 104-105).

this motion from the bench (Tr. 521-522). After a jury trial, respondent was convicted and sentenced to a term of two years' imprisonment (Pet. 4).

3. The court of appeals reversed, writing a brief opinion holding that the provision of Section 1715 forbidding the mailing of firearms "capable of being concealed on the person" is unconstitutionally vague (Pet. App. 1a-3a). The court of appeals apparently thought that this result was required not only because the statute does not identify the size, build and dress of the "person" to whom it refers, but also because a more precise statute might have been drawn using numerical definitions. The court wondered (Pet. App. 2a-3a):

Did Congress intend that this "person" be the person mailing the firearm, the person receiving the firearm, or, perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season? We believe that this question, of itself, demonstrates the impermissible vagueness of the statute and its inadequacy to define the intended offense with sufficient specificity.

The court of appeals did not attempt to ascertain whether respondent knew or could have known that the sawed-off shotgun she mailed was "capable of being concealed on the person." Instead, the court declared that the statute is unconstitutionally vague "as it is applied to 'other firearms'" (Pet. App. 3a), thereby invalidating that portion of the statute on its face.

ARGUMENT

AN ORDINARY CRIMINAL STATUTE SUCH AS SECTION 1715 SHOULD NOT BE INVALIDATED ON ITS FACE

A. INTRODUCTION AND SUMMARY

Two competing principles dominate the law of vagueness. On the one hand, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process" (*Connally v. General Construction Co.*, 269 U.S. 385, 391). But, on the other hand, it has never been doubted that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree" (*Nash v. United States*, 229 U.S. 373, 377). The conflict is created by the imprecision inherent in language and by the need for legislatures to speak to situations that cannot be foreseen in full particularity. Consequently, "[w]henver the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk" (*United States v. Wurzbach*, 280 U.S. 396, 399).

Claims that a statute is unconstitutionally vague raise difficult issues because of the undisputed validity (and great sweep) of the competing principles that govern their resolution. This case concerns the manner in which the difficult task of resolving such claims

should be carried out. It does not require the Court to answer the ultimate question whether Section 1715 did or did not give respondent adequate notice of the conduct it forbids.

In considering an assertion that an ordinary criminal statute is void for vagueness, a court first should ask: "Does the statute intelligibly prohibit anything?" If the court concludes that some body of conduct clearly is forbidden by the statute, then it cannot be void on its face. Most criminal statutes satisfy this test, because they describe a standard by which compliance can be measured. Section 1715, for example, establishes a standard that depends primarily (although not entirely) upon the size of the firearm; the smaller the weapon, the more readily it is "capable of being concealed on the person." But even when the statute's language is refractory, a court is under a duty to construe it (if possible) to establish such a standard, and thereby to create a benchmark by which those with a will to do so may conform their conduct to its commands.

If the statute, either by its words or as construed by a court, gives fair warning that at least some specifiable conduct is forbidden, then it cannot be struck down on its face. The court must instead inquire whether it gave notice as applied to the person and facts before it. The inevitable problems of uncertainty that arise near the outermost limits of the statute's reach may be dealt with by considering the well-established rules of criminal law that an individual who approaches close to the zone of prohibited conduct takes the risk that he or she will overstep the line, but

that where the zone of prohibited conduct is itself imprecise, a “rule of lenity” will contain the risk within reasonable bounds. The only exception to this approach is in the case of statutes that impinge overbroadly upon, and threaten to impair the exercise of, rights protected by the First Amendment. Since the shipment of firearms is not remotely connected to First Amendment interests, this exception is wholly inapplicable here.

The court below employed quite a different process. It inquired only whether the statute’s language is imprecise, and whether more precise language could be imagined. Answering both questions affirmatively, it concluded that the phrase “capable of being concealed on the person” is impermissibly vague, and therefore invalid on its face, as applied to *all* “other firearms.” The court did not determine whether the pertinent language of Section 1715 has an unambiguous core meaning, or whether it could be construed to produce one. Nor did the court inquire whether respondent knew or could have known, had she attempted to comply, that she was offending the statute’s command. Because Section 1715 does have an ascertainable core meaning when applied to “other firearms,” we submit that this case must be returned to the court of appeals for reconsideration in light of the correct standards.

**B. A STATUTE CONTAINING AN INTELLIGIBLE STANDARD OF CONDUCT
IS NOT VAGUE ON ITS FACE**

One of the most firmly established rules of constitutional adjudication is that “vagueness challenges to statutes which do not involve First Amendment free-

doms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, No. 73-1018, decided January 21, 1975 (slip op. 6). This rule is supported by the fundamental principle that a litigant may assert only his own rights; unless a litigant is injured by the alleged flaw in a statute, he is not entitled to redress on the ground that the flaw may be deleterious to others.⁴ A statute's potential for uncertain application may injure some without injuring others. The words of a statute may prohibit with reasonable certainty many varieties of conduct, while at the same time having only speculative effect on other conduct. The principle that a litigant may complain only of his own injury, when applied to claims of vagueness, means that one to whom the statute clearly applies may not complain that its application to others differently situated would be unconstitutionally uncertain.

This restriction, when combined with "[t]he strong presumptive validity that attaches to an Act of Congress[,] has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language" (*United States v. National Dairy Products*

⁴ See generally Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974).

This principle is supported by the rule that a court should not "anticipate a question of constitutional law in advance of the necessity of deciding it" (*Liverpool, New York and Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39) and by the Article III requirement of a "case or controversy."

Corp., 372 U.S. 29, 32). A statute may not be upset on an allegation of vagueness as long as it leaves little doubt as to its application to the particular case. *Cameron v. Johnson*, 390 U.S. 611, 616.

There are only two occasions on which a court may examine a statute "on its face." Neither is applicable to this case. First, a statute that affects or attempts to regulate First Amendment freedoms may, in certain instances, be dealt with on its face (*i.e.*, at the behest of a litigant challenging its application to circumstances different from those of his case) because of the special dangers vagueness poses to protected and favored activities. A vague statute carries with it the potential for overbreadth; the more nebulous the standards of the statute, the more likely some of its applications may touch upon protected speech. See, *e.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611. Because of this possibility, vague statutes will produce a "chilling effect" as people attempt to refrain from saying or doing things that would expose them to the danger of prosecution, even for protected speech. See, *e.g.*, *Gooding v. Wilson*, 405 U.S. 518, 521; *Thornhill v. Alabama*, 310 U.S. 88, 97-98. Moreover, even when protected speech is not "chilled," a vague statute offers opportunities for discriminatory enforcement that might harass those who have done no more than disagree with the views of the local authorities. See, *e.g.*, *Smith v. Goguen*, 415 U.S. 566, 573-578; *Grayned v. City of Rockford*, 408 U.S. 104, 109. But these dangers do not extend beyond the realm of First Amendment freedoms. It would be permissible, for example, for Congress to enact a statute

having a "chilling effect" on an individual who desired to mail a shotgun with an overall length of 30 inches, since no special constitutional protection shelters the mailing of shotguns. Because Section 1715 does not touch upon First Amendment interests, these cases do not support a facial attack.⁵

The second exception covers statutes so vague that "no standard of conduct is specified at all." *Coates, supra*, 402 U.S. at 614. The statute can be assessed on its face if it fails to create "an ascertainable standard of guilt, * * * [and] leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee * * *" (*United States v. Cohen Grocery Co.*, 255 U.S. 81, 89). *Lanzetta v. New Jersey*, 306 U.S. 451, the only case relied upon by the court of appeals, involved such a statute.⁶ When a statute is so ambulatory that it has no core of intelligible prohibition, it would be vain to attempt to consider it only "as applied," for it would be vague as applied to any conceivable acts, unless a court abjured the judicial role and rewrote the legislation entirely.

Few statutes are this vague. Most contain within them some standard devised by the legislature, reasonably referring to the common law or common understanding, that enables those who sincerely desire to do so to comply with their requirements. For

⁵ Even in First Amendment cases, those whose acts are within the absolute core of the statute's prohibition cannot mount a facial challenge. *Smith, supra*, 415 U.S. at 577-578; *Broadrick v. Oklahoma*, 413 U.S. 601, 608.

⁶ See also *United States v. Cohen Grocery Co.*, *supra*; *Connally, supra*; *Papachristou v. City of Jacksonville*, 405 U.S. 156.

example, *Nash v. United States*, *supra*, dealt with the Sherman Antitrust Act and with the "rule of reason" developed under it. The Court held that trade usage and developing case law created a standard of unreasonable combinations in restraint of trade sufficient to support criminal penalties.

When the unaided words of a statute appear to leave open to doubt its application to a great many situations, it nevertheless is sufficiently specific as long as it contains "a standard of some sort" (*Connally*, *supra*, 269 U.S. at 392).⁷ Once the statute or its legislative history establishes an objective standard, the Court then can use the ordinary principles of statutory construction to provide the required precision in application.⁸ When a statute is challenged for vagueness, "we have consistently sought an interpretation which supports the constitutionality of legislation" (*National Dairy*, *supra*, 372 U.S. at 32).⁹ If a

⁷ The "standard" ordinarily must be one capable of determination by reference to objective criteria. The vagueness problem is more difficult when the statute refers to the subjective reactions of unknown (and perhaps unknowable) people. See, e.g., *Coates*, *supra* (statute making it illegal for three or more persons to "conduct themselves in a manner annoying to persons passing by" is unconstitutionally vague). But see *Grayned*, *supra* (statute penalizing those "willfully making noise or diversion that disturbs or tends to disturb the peace or good order of [a] school session" is not vague).

⁸ See Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U.Pa. L. Rev. 67, 82-85 (1960), which suggests that this Court's inability to give a narrowing construction to state statutes accounts for the fact that almost all statutes held unconstitutional for vagueness have been state statutes.

⁹ See also *United States v. Vuitch*, 402 U.S. 62, 72; *Screws v. United States*, 325 U.S. 91, 98-100. Cf. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348.

"general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction" (*United States v. Harriss*, 347 U.S. 612, 618). The construction may take into account the legislative intent as revealed in the legislative history. But it may as properly utilize ordinary human understandings. "The use of common experience as a glossary is necessary to meet the practical demands of legislation" (*Sproles v. Binford*, 286 U.S. 374, 393).¹⁰

Because Section 1715 does not impinge upon protected speech, and because it is not so irremediably vague that it conveys no ascertainable prohibition at all, it must be assessed as it applies to particular cases, on their particular facts. "[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise" (*Harriss, supra*, 347 U.S. at 618). Or, to put the proposition in a slightly different way, "if there is any difficulty * * * it will be time enough to consider it when raised by someone whom it concerns" (*Wurzbach, supra*, 280 U.S. at 399).

C. PROBLEMS ARISING AT THE OUTER REACHES OF A STATUTE'S SCOPE
MUST BE ASSESSED "AS APPLIED"

If the statute, either by its words or in light of common experience and judicial construction, estab-

¹⁰ See also, e.g., *McGowan v. Maryland*, 366 U.S. 420, 428-429 (the words of a statute may be augmented by "ordinary commercial knowledge" and "reasonable investigation").

lishes some ascertainable standard by which those who seek to do so may conform their conduct to its command, then problems of vagueness must be assessed as the statute is applied to particular facts. *National Dairy, supra*, 372 U.S. at 33. It is not relevant to this assessment that some varieties of conduct may be neither clearly forbidden nor clearly permitted. The court of appeals apparently believed that, if difficult cases could be put (for example, a small person on a beach in southern California might not wear sufficient clothing to conceal a sawed-off shotgun), the statute must fall. But “[i]n most English words and phrases there lurk uncertainties” (*Robinson v. United States*, 324 U.S. 282, 286), and “lack of precision is not itself offensive to the requirements of due process” (*Roth v. United States*, 354 U.S. 476, 491). In the case of most statutes, “generality * * * does not obscure its meaning or impair its force within the scope of its application * * *” (*United States v. Classic*, 313 U.S. 299, 328–329). “That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous * * *” (*United States v. Petrillo*, 332 U.S. 1, 7).

This Court succinctly summarized all of these principles only last term. It wrote: “None of [the standards by which vagueness is evaluated] suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and

literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756.

This does not mean, of course, that those whose conduct may be within the zone of uncertainty are without recourse. If the statute does not give them fair warning, it may be vague as applied to them. Moreover, true ambiguity in the ambit of a criminal statute often is resolved by judicial construction in favor of lenity.¹¹ This rule, "founded on the tenderness of the law for the rights of individuals" (*United States v. Wiltberger*, 5 Wheat. 76, 95), ameliorates any unnecessary harshness and avoids the imposition of punishment because of truly unexpected applications of a statute.

Particularly in light of these saving doctrines, however, an individual cannot claim that the marginal uncertainties inevitably surrounding criminal statutes render them unconstitutional. Almost all statutes, read in light of their legislative history and judicial construction, and "[t]aken in connection with the danger to be prevented * * * lay[] down a plain enough rule of conduct for anyone who seeks to obey the law" (*United States v. Alford*, 274 U.S. 264, 267). "[F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government

¹¹ See, e.g., *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222; *Bell v. United States*, 349 U.S. 81, 83; *Rewis v. United States*, 401 U.S. 808; *United States v. Enmons*, 410 U.S. 396, 411.

inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines v. United States*, 342 U.S. 337, 340.

D. SECTION 1715 CONTAINS AN INTELLIGIBLE STANDARD OF CONDUCT

We submit that Section 1715 contains a clear standard of conduct. The statute states that all firearms¹²

¹² Respondent apparently contends (Br. in Opp. 4-6) that sawed-off shotguns are not "firearms" within Section 1715. This argument, which was not considered by the court of appeals, is without support. Section 1715 was based upon the Act of February 8, 1927, 44 Stat. 1059. The legislative history of that Act (see H.R. Rep. No. 610, 69th Cong., 1st Sess. (1926)) indicates that a major purpose of the bill was to prevent the use of the mails to transport firearms that were often illegal under state law. Sawed-off shotguns fit that description. Postmaster General New, commenting on the proposed legislation, remarked that the bill should exempt only firearms "incapable" of being concealed, "such as firearms used in field sports, hunting, etc." H.R. Rep. No. 610, *supra*, at p. 2. Representatives on the floor of the House expressed a desire to limit access to all sorts of concealable firearms that might be used to perpetrate crimes. See 66 Cong. Rec. 725-735 (1924). Similarly, when Congress for purposes of other legislation has defined "firearm" more specifically, it has included short-barreled shotguns within that term. See 26 U.S.C. 5845(a); 18 U.S.C. 921(a)(3)(A). We submit that there is ample support for the conclusion that "other firearms" includes sawed-off shotguns.

Respondent relies upon the "*ejusdem generis*" principle. But this principle is a tool of statutory construction, not a method of defeating a statute's purpose. *Gooch v. United States*, 297 U.S. 124, 128. Sawed-off shotguns are as concealable as many long-barreled pistols and revolvers. They

"capable of being concealed on the person" are non-mailable. This establishes a standard referring primarily to the size of the firearm; the smaller the firearm, the more readily it is "capable of being concealed on the person."¹³ Some long-barreled weapons are so large that they would not be capable of such concealment. But others are sufficiently short that they are "capable" of being concealed—by people determined to conceal them—under a jacket or coat, inside a pants leg, or even in a hand bag. A sawed-off shotgun with a 10 inch barrel and an overall length of approximately 22 inches is "capable" of being concealed in hand bags of even moderate size, and would fit under the jacket of most men's suits. Indeed, common experience suggests that the usual, and perhaps the sole, reason for sawing off the barrel of a shotgun is to permit its concealment.¹⁴

Even if some uncertainty remains in light of this common experience, this Court should construe Section 1715 in a way that produces an unambiguous core of actions clearly prohibited by the statute. In so do-

therefore share with those firearms the characteristic Congress believed warranted exclusion from the mails. See also 29 C.F.R. 124.5(a)(4), discussed *infra*, p. 18.

¹³ "Size" includes not only barrel length, but also weight and bulkiness. Other relevant factors include shape and the ease with which a weapon can be broken down and reassembled.

¹⁴ For a sampling of recent cases in which like weapons concealed on the person have been used in criminal activity, see *e.g.*, *United States v. Ackerson*, 502 F. 2d 300 (C.A. 8); *United States v. Mayo*, 498 F. 2d 713 (C.A.D.C.); *United States v. Story*, 463 F. 2d 326 (C.A. 8), certiorari denied, 409 U.S. 988; *Harrison v. United States*, 359 F. 2d 214 (C.A.D.C.); *People v. Owens*, 18 N.Y. 2d 972, 224 N.E. 2d 718. Cf. *State v. Mayfield*, 506 S.W. 2d 363 (Mo. Sup. Ct.).

ing the Court might draw upon 39 C.F.R. 124.5, an interpretive regulation promulgated by the Postal Service. Under that regulation, short-barreled shot-guns are "firearms" (39 C.F.R. 124.5(a)(4)), and they are regarded by the Postal Service as "capable of being concealed on the person" if they have a barrel length of less than 18 inches and an overall length of less than 26 inches (39 C.F.R. 124.5(a)(5)). Although these regulations are not conclusive of the meaning of Section 1715, they would, if used as the basis for judicial construction, substantially clarify its meaning. Moreover, as the interpretation of Section 1715 by responsible administrative officials, they are entitled to some deference,¹⁵ and even without judicial construction they provided guidance on the statute's meaning to all those who sought to comply. Cf. *Colten v. Kentucky*, 407 U.S. 104, 110. In sum, Section 1715, with or without judicial construction, provides enough guidance that it cannot be unconstitutionally vague on its face.¹⁶

¹⁵ See *Grayned v. City of Rockford*, *supra*, 408 U.S. at 110. Cf. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210; *Udall v. Tallman*, 380 U.S. 1, 16.

¹⁶ Many criminal statutes less precise than Section 1715 have been sustained. See, e.g., *Mazurie*, *supra* ("non-Indian community"); *National Dairy*, *supra* ("unreasonably low prices"); *United States v. Korpan*, 354 U.S. 271, 272, 273, n. 2 ("coin operated amusement or gaming device"); *Boyce Motor Lines*, *supra* ("so far as practicable, * * * driving into or through congested thoroughfares"); *Robinson*, *supra* ("liberated unharmed" in kidnapping statute); *United States v. Gaskin*, 320 U.S. 527 ("condition of peonage"); *United States v. Ragen*, 314 U.S. 513, 517 ("reasonable allowance for salaries"); *Sproles*, *supra* ("shortest practicable route"); *United States v. Alford*, 274 U.S. 264 ("in or near any forest, timber, or other inflam-

The only remaining argument is the court of appeals' apparent belief that Section 1715 is defective because it could have been drafted with greater precision. This complaint is equally true, however, of every criminal statute. The Court in *Petrillo*, *supra*, 332 U.S. at 7, agreed that "[c]learer and more precise language might have been framed by Congress * * *," but it held that the statute nevertheless gave adequate notice of the conduct forbidden. The availability of alternative language neither adds to nor subtracts from the amount of notice the statute provides. And if, as written, it provides constitutionally adequate notice, it must be sustained for that reason. *Roth v. United States*, *supra*, 354 U.S. at 491.

Additional specificity in criminal statutes is not necessarily beneficial.¹⁷ Although an increase in specificity (here, the adoption of numerical definitions) would enable those who wish to mail firearms to assess with greater accuracy the probability that their acts would violate the statute, it also would risk placing outside the scope of the statute some conduct that Congress desired to prohibit. Every increase in specificity would carry with it an opportunity, for those who desire to bring about the result the statute is intended to prevent, to alter their behavior to circum-

mable material"); *Miller v. Oregon*, 273 U.S. 657 (explained at 274 U.S. 464-465) (drive a vehicle in "a careful and prudent manner"); *Omaechevarria v. Idaho*, 246 U.S. 343, 345 n. 3 (any range "usually occupied by any cattle grower").

¹⁷ For a comprehensive discussion of the costs and benefits of both generality and specificity, see Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Studies 257 (1974).

vent the statutory purpose. In other words, greater specificity frequently generates "loopholes." For example, if Section 1715 were amended to express its prohibition in terms of the length of the firearm, industrious malefactors would be able to create firearms of the minimum length that also possessed other characteristics (such as slimness, or ability to be broken down and reassembled rapidly) making them as readily concealable as shorter weapons, the mailing of which is forbidden.¹⁸ This would be contrary to the intention of Congress, for it would produce the result (the mailing of firearms capable of being concealed on the person) that the statute was intended to prohibit. By framing its statutes in terms of the result to be achieved Congress is able, at minimal cost in uncertainty, to prohibit more effectively the evil that prompted the statute's enactment.

In some statutes Congress has been more precise.¹⁹ That is its prerogative. But unless the language it chose in Section 1715 is itself too indefinite to provide an ascertainable standard of conduct, it is not consti-

¹⁸ The Postal Service regulations, which establish numerical guidelines dependent on the length of the firearm, also provide that shotguns of greater dimensions are nonmailable if they have "characteristics allowing them to be concealed on the person." 39 C.F.R. 124.5(a)(5).

¹⁹ 18 U.S.C. 921(a)(6) defines "short-barreled shotgun" as a shotgun with barrels less than 18 inches long and an overall length of less than 26 inches. The firearm mailed by respondent is a "short-barreled shotgun" under that standard. Some States (see, *e.g.*, Revised Code of Washington Annotated § 9A.1010 (1961)) also use numerical definitions. Under the Washington code, a "short firearm" includes any shotgun with a barrel length of less than 12 inches. The firearm mailed by respondent is a "short firearm" within even that restrictive standard.

tutionally relevant that it could have followed the course of more particularized definition.

For the reasons we have advanced above, we submit that Section 1715 establishes a standard sufficiently clear that at least some types of conduct are indisputably within the scope of its prohibition. Accordingly, the court of appeals was not at liberty to invalidate it on its face.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to consider whether Section 1715 gave respondent adequate notice that her conduct was prohibited.

Respectfully submitted.

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May 1975.

JUN 16 1975

MICHAEL P. JONES, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 74-884

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSEPHINE M. POWELL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a statute prohibiting the mailing of pistols, revolvers and other firearms capable of being concealed on the person is unconstitutionally vague as applied to sawed off shotgun and other similar short barreled rifles.

STATEMENT

Respondent has no particular quarrel with the petitioner's statement of the case except that much of petitioner's statement is immaterial to the resolution of the question presented.

Respondent was indicted on a single count of mailing a firearm capable of concealment on the person, in violation of 18 U.S.C. 1715. The firearm that she allegedly mailed was a shotgun with a modified barrel and a modified stock. The shotgun was approximately twenty-two (22) inches long and the barrel measured approximately ten (10) inches. (A.96) The weapon is large and bulky. (A.101) An agent from the Bureau of Alcohol, Tobacco and Firearms in Spokane, while admitting that he was not an expert in firearms, did testify that the only two ways that he knew of to conceal a weapon as large as the one in question, would be to place the weapon under an outer garment such as an overcoat, or inside a pair of trousers. (A.96) Both methods of concealment would leave large bulges. (A.97) The agent testified further that almost any type of gun could be concealed. (A.97)

After a jury trial Respondent was convicted of violating 18 U.S.C. 1715 and sentenced to a term of two years imprisonment.

The Court of Appeals reversed the conviction, holding that the portion of the statute (18 U.S.C. 1715) making it unlawful to mail "firearms other than pistols and revolvers capable of being concealed on the person" was not language of sufficient constitutional definiteness to advise persons of common experience and intelligence that it was unlawful to mail sawed off shotguns.

Contrary to the petitioner's suggestion in its statement of the case, (page 5 of Petitioner's Brief), the Court of Appeals did not invalidate the "other firearms" portion of 18 U.S.C. 1715 on its face, but, in fact, invalidated the "other firearms" prohibition "as it might relate to sawed off shotguns" (Pet. App. 2a) and inferentially, at least, as it might relate to other weapons similar to sawed off shotguns.

In light of its opinion the Court of Appeals did not reach respondent's other seven assignments of error basically relating to the admissibility of handwriting exemplars, and welfare records introduced at trial.

ARGUMENT

Initially, the question presented to this Court should be placed in its proper perspective. 18 U.S.C. 1715 was not voided on its face, as petitioner so strenuously argues in its Brief.

A fair and careful reading of the opinion of the Court of Appeals reveals that the statute was voided not on its face, but as applied to the respondent, and sawed off shotguns specifically, and similar short weapons generally.¹

The respondent did not mount a facial challenge to the statute. She only challenged the statute's lack of certainty as the statute applied to large and bulky shoulder weapons such as the sawed off shotgun

¹The Court of Appeals held that although little question can be raised as to the concealability of pistols and revolvers, the statutory prohibition "as might relate to sawed off shotguns" is not so readily recognizable. The opinion should be read to invalidate the statute as applied to respondent and not invalidating the statute on its face.

connected with this case. Had respondent been convicted of mailing a pistol or revolver, and on appeal claimed that the *other firearm* provision of the statute was constitutionally uncertain, then petitioner's *jus tertii* standing argument (or in this case, lack of standing) would have merit. However, that not being the case, petitioner's analysis of the case at Bar as being a facial attack of the statute (Brief 8-13) offers little assistance to the resolution of the question presented.² Petitioner argues that since the respondent's activity is clearly prohibited within the statute, then petitioner may not contend that the statute is or may be overly broad as applied to others. In that argument petitioner assumes as fact the very issue of this appeal; that is, does the statute clearly apply to the respondent? Does the statute offer to the respondent fair warning of the criminality of her own conduct. Respondent contends and the Court of Appeals so held that the statute does not provide such warning.

Since this statute is not being attacked facially by one clearly within its prohibition, the question then, is not whether "pistols, revolvers and other firearms capable of being concealed" provides *any* discernible area of proscription, for indeed, it does when referring to the case of pistols and revolvers and other firearms

²Petitioner argues that since the statute does apply to respondent's conduct, then a lesser standard of certainty will apply to this statute suggesting that the statute would not be void from vagueness *unless* the statute regulated some first amendment freedoms (*Coates v. City of Cincinnati*, 402 U.S. 611), or unless the statute was *so vague* that no standard of conduct is specified at all; therefore leaving open the widest conceivable inquiry, the scope of which no one can foresee. Citing *U.S. v. Cohen Grocery*, 255 U.S. 81.

of the similar size of pistols and revolvers, but the question, moreover, is whether the language of this statute is sufficiently certain to prohibit the mailing of weapons like a bulky sawed off shotgun approximately two feet in length.

We must then synthesize from the fabric of the law of vagueness a standard of certainty. The verbal expression of this standard of certainty required in penal statutes is less difficult than the application of that standard to a particular case.³

Mr. Sutherland, in *Connally v. General Construction Co.*, 269 U.S. 385, aptly expressed the general standard of certainty required in penal statutes when he wrote:

"...that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized rule; consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Connally v. General Construction Co.*, *Supra*, at 391.⁴

The language of the statute questioned at Bar, must be tested against this often quoted standard of

³See *Winters v. New York* 333 U.S. 507, 518 (1947) where the Court required three oral arguments before applying the standard to that case.

⁴In accord with the expression in *Lanzetta v. New Jersey* 306 U.S. 541 (1939) *Winters v. New York*, *Supra*, *U.S. v. Harriss*, 347 U.S. 612, *Herndon v. Lowry*, 301 U.S. 242.

certainty.⁵ Indeed, there is sound reasoning behind such a requirement of certainty in criminal statutes. Vague or uncertain laws offend several important values. First, vague statutes provide no guide by which men can steer between lawful and unlawful conduct. *Grayned v. City of Rockford*, 408 U.S. 104. Second, vague laws are a breeding ground for arbitrary and discriminatory enforcement and impermissibly delegate to police; judges, and juries the resolution of legislative policy; often on an ad hoc and subjective basis. *Grayned v. City of Rockford*, *Supra*.

However, the difficulty of vagueness law lies not with the concept but with its application. It is often a difficult decision to determine when and where to draw the line between lawful and unlawful conduct. Because of this difficulty in application, Courts will often attempt to balance the vagueness of the statute against the social desirability of the particular legislative policy which the Court believes the statute is meant to reach.⁶ However, such a balance would be improper. An application of the vagueness doctrine by result is improper and lends itself to a subjective standard. The Court must, instead, resort to some objective criteria when determining the breadth of a penal statute. Respondent contends that Section 1715, when applied

⁵ Petitioner suggests that since this is not a first amendment case then a standard even less than that found in the *Connally* case should apply. However, *Connally* itself was not a first amendment case. In first amendment cases a test more strict than that in *Connally* would apply.

⁶ Petitioner seems to argue this 'result oriented application.' Respondent's actions should be unlawful according to petitioner therefore, we should relax the level of certainty required to include respondent's activity.

to sawed off shotguns and weapons similar in size, does not pass the objective test of certainty set forth in the Connally case.⁷

Section 1715 prohibits the mailing of pistols, revolvers and other firearms capable of being concealed on the person. Applying the principles of statutory construction⁸ the more general language of the statute (firearms), will be modified and limited by the more specific language of the statute (pistols and revolvers). A reasonable construction of the statute would then dictate that the scope of conduct proscribed is the mailing of concealable firearms such as pistols and revolvers.

The word firearms is not such a technical word that it would offer any restrictive definition in and of itself. Neither does the word firearm have any well known common law meaning. In fact, the Supreme Court of Colorado, when interpreting the word firearm in a similar statute, concluded that its meaning would not include sawed off shotguns and other shoulder type weapons. *Cokley v. People* 450 P.2d 1013 (Colorado

⁷The decisions upholding statutes challenged as vague seem to center on the fact that the words or phrases used in the challenged statute have either a technical or special meaning well enough known to enable those within the reach of the statute to correctly discern their meaning; or the words or phrases have generally known common laws meaning. *Connally v. General Construction Co.* 269 U.S. 385.

⁸The ejusdem generis principle of statutory construction sets forth this rule. The principle is not used, as petitioner argues, to defeat the meaning of 1715. Moreover, it is used as a guide of statutory construction to determine the meaning of 1715 as presently written.

Sup. Ct. 1972).⁹ Therefore, the use of the word firearm does little to remove the uncertainty of the statute.

Furthermore, the language "capable of being concealed on the person," does not, in and of itself, offer a discernible standard. The Court of Appeals indicated that when they asked;

"Did Congress intend that this 'person' be the person mailing the firearm, the person receiving the firearm, or, perhaps an average person, mail [sic] or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season" (Pet. App. 2a-3a)

The Court of Appeals vividly expressed the inability of the language "capable of being concealed on the person" to offer some discernible standard.

Therefore, the pertinent language of the statute does not have any clear or well known meaning and does not in and of itself provide any standard of certainty sufficient to meet the requirements of the Connally case. In fact, the only language in the statute having such a common meaning and offering any discernible standard is the phrase "pistols and revolvers."

It seems then from the standpoint of statutory construction the statute would not involve sawed off shotguns. Furthermore, from the standpoint of the definition of the words of the statute, the phrase "firearms capable of being concealed on the person" does not consist of words of technical meaning or

⁹That is not to say that this Court need adopt the reasoning of the Colorado Court. However, the very fact that the Colorado Supreme Court would interpret firearms as not including sawed off shotguns would indicate that the words meaning is, at least, given to different interpretations by men of common intelligence.

generally known common law meaning so as to inject into this portion of the statute the required degree of constitutional certainty.

Even the history of the statute does not specifically mention shoulder type weapons. Congress was, in enacting this statute, principally concerned with prohibiting the mailing of pistols and revolvers. It is the pistol and revolver that are most often used in strong arm robberies and other violent crimes. They are easily concealed and easily transported by the mails. If Congress had intended that the statute prohibit the mailing of modified shotguns and other similar shoulder weapons, Congress could have easily drafted the statute along those lines. Indeed, Congress has drafted other legislation that has specifically defined these types of weapons.¹⁰

Finding a discernible standard in the language "firearms capable of being concealed" presents many of the same problems that the Court found in interpreting the phrase "current rate of wages" in *Connally v. General Construction Co.*, *Supra*. There the Court wrote,

"The 'current rate of wages' is not simple, but progressive—from so much (the minimum) to so much (the maximum), including all in between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer."

¹⁰That is not to argue that the statute is vague because there was more precise language available to Congress. The argument is offered only to demonstrate that Congress is mindful of the distinction between handguns and shoulder weapons.

The statute at Bar has a similar defect. Petitioner argues that there is at least some standard in 1715; presumably found between pistols (the minimum) and (inferentially at least) full sized rifles and shotguns (the maximum), and that respondent finds herself somewhere in between. However, without language in the statute drawing a finer line than this, what is meant by "firearms capable of being concealed on the person" is incapable of any definite answer. It would only be left for the respondent and others to speculate or conjecture as to where the dividing line falls between lawful and unlawful conduct. A statute that requires this kind of speculation is repugnant to the fundamental principles of due process.

This is not a case of degree as was the case of *Nash v. United States* 229 U.S. 373. Before one's fate will depend on estimating rightly as the jury may later estimate in terms of degree, one must first be clearly within the zone of prohibited conduct. An example of degree would be whether or not a specific act of homicide (the prohibited conduct) would amount to first degree murder, second degree murder or manslaughter. In the statute at Bar, sawed off shotguns are not clearly within the statutes proscription, so as to make the question at Bar merely one of degree.

Petitioner argues that specificity in criminal statutes is not necessarily beneficial and therefore, should not be required in every case. While that statement may be true from the standpoint of efficient law enforcement, it is not true from the standpoint of due process. While due process is tolerant of general language in areas where the policy legislated is a difficult concept to

express (e.g. Condition of Peonage),¹¹ due process is not tolerant of general language in areas capable of more definite conceptualization. Otherwise, general statutes, under the guise of efficient administration of justice, would permit arbitrary and discriminatory enforcement by police and upset a fundamental check and balance of our criminal justice scheme.

It has not been shown here, and could not be shown, that the policy of 18 U.S.C. 1715, was a difficult concept to express, therefore necessitating broad and general language. Congress had little trouble expressing a similar concept in 18 U.S.C. 921, with very precise language.

¹¹Although if a first amendment protected right is at stake even general language is not tolerated. See *Cramp v. Board of Public Instruction* 368 U.S. 278; *Grayned v. City of Rockford*, *Supra*, (Vagrancy statute); *Papachruston v. City of Jacksonville* 405 U.S. 156.

CONCLUSION

In conclusion then, respondent respectfully submits that the "other firearms capable of being concealed on the person" provision of 18 U.S.C. 1715, as applied to sawed off shotgun and other similar type weapons, does not offer a discernible standard of conduct by which men of ordinary intelligence can fairly estimate the statute's prohibitions, and that portion of the statute is, as applied, unconstitutionally vague and violative of the due process clause of the United States Constitution. It being so, this Court should uphold and affirm the ruling of the Court of Appeals, reversing respondent's conviction.

Respectfully submitted,

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